

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers</b>	)	<b>CC Docket No. 01-338</b>
	)	
<b>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</b>	)	<b>CC Docket No. 96-98</b>
	)	
<b>Deployment of Wireline Services Offering Advanced Telecommunications Capability</b>	)	<b>CC Docket No. 98-147</b>
	)	

**INITIAL COMMENTS OF THE UNE PLATFORM COALITION**

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## TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY.....	2
II. JOINT COMMENTORS ARE BRINGING COMPETITION TO MASS-MARKET LOCAL TELECOMMUNICATIONS CUSTOMERS THROUGH THE INTRODUCTION OF UNIQUE AND INNOVATIVE SERVICES .....	5
A. The First Generation Products And Services.....	5
B. Second Generation Products And Services .....	11
III. IN GENERAL, THE COMMISSION SHOULD MAINTAIN THE APPROACH ADOPTED IN THE <i>UNE REMAND ORDER</i> IN UNDERTAKING ITS UNBUNDLING ANALYSIS AND IN INTERPRETING THE §251(D)(2) ‘NECESSARY AND IMPAIR’ STANDARD .....	16
A. The Commission’s Interpretation Of The Statutory ‘Necessary And Impair’ Standard In The <i>UNE Remand Order</i> Is Generally Sound And Should Be Maintained.....	20
B. The Existence (Or Lack) Of A Wholesale Market For An Element Is A Key Indicator Of Competition .....	21
C. The ‘Necessary And Impair’ Standard, Including The Public Interest, And The ‘Materially Diminish’ Analysis Can Only Be Considered by the Commission, Along With Other Factors, To Expand the National Minimum List Of UNEs .....	21
D. The Commission Must Take Into Consideration The Public Interest In Applying The Unbundling Standard.....	24
E. The Commission Must Take Into Account State Statutes Granting Unbundling Authority And State Retail Pricing Regimes .....	25
IV. THE COMMISSION’S CONCLUSION THAT THE UNBUNDLING ANALYSIS CONDUCTED AS PART OF THIS TRIENNIAL REVIEW SHOULD BE MORE ‘GRANULAR’ IS NOT ADMINISTRATIVELY PRACTICAL AT THE NATIONAL LEVEL.....	26

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
<b>A. The Commission Should Adopt The PACE Proposal And Allow States The Opportunity To Review The Appropriateness Of Any Reduced Unbundling Obligations .....</b>	<b>27</b>
<b>B. Facts May Vary Significantly From Geographic Area To Geographic Area, And The States Are Best Positioned To Conduct The Fact-Specific Inquiry Contemplated By The Commission .....</b>	<b>30</b>
<b>C. The FCC Should Reaffirm That Its UNE List Is A National Minimum, And It Should Be Left To The States To Determine Whether And When Any Decreased Unbundling Obligations Become Effective In Their State .....</b>	<b>32</b>
<b>D. Numerous State Commissions Have Required ILECs To Provide New Combinations of Network Elements.....</b>	<b>35</b>
<b>V. CONGRESS ENVISIONED THE WIDESPREAD AVAILABILITY OF NETWORK ELEMENTS, RECOGNIZING THAT UNE AVAILABILITY IS ESSENTIAL TO PROMOTE THE ACT'S GOAL OF ROBUST, SUSTAINABLE LOCAL COMPETITION.....</b>	<b>38</b>
<b>VI. APPLICATION OF THE 'NECESSARY AND IMPAIR' STANDARD COMPELS RETENTION OF ALL EXISTING UNES.....</b>	<b>40</b>
<b>A. The Commission Must Continue to Require Unbundled Access to Local Loops .....</b>	<b>40</b>
<b>B. CLECs Are Materially Impaired Without Access To ULS To Serve Mass-Market Customers .....</b>	<b>42</b>
<b>1. Ubiquity .....</b>	<b>43</b>
<b>2. Cost, Timeliness And Impact On Network Operations.....</b>	<b>44</b>
<b>3. ILECs Confirm That The Collocation/Hot-cut Process Results In Material Impairment As A Result Of Negative Impacts On Quality, Timeliness And Impact On Network Operations.....</b>	<b>49</b>
<b>C. Shared Interoffice Transport.....</b>	<b>53</b>
<b>D. Operator Services (OS) / Directory Assistance (DA).....</b>	<b>55</b>

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
1. CLECs Are Impaired Without Unbundled Access To OS/DA Because The Geographic Dispersion Of The Mass-market Impairs CLECs Seeking To Offer OS/DA Services Using Third Party Providers .....	56
2. The Commission Should Continue To Require That ILECs Offer OS And DA As UNEs Until They Can Demonstrate That An Efficient Custom Routing Scheme Has Been Implemented That Allows CLECs To Aggregate And Transport Their OS/DA Traffic To Alternative Providers Without Impairment.....	58
VII. REDLINING ANALOG BUSINESS LINES, OR RESTRICTING UNE-P AVAILABILITY IN SOME LOW COST AREAS, WOULD IRREPARABLY HARM MASS-MARKET COMPETITION.....	59
A. Entrants With Mass-market Business Strategies Must Be Able To Compete In Both Low And Higher Cost Areas.....	61
VIII. CONCLUSION .....	62

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**INITIAL COMMENTS OF THE UNE PLATFORM COALITION**

The UNE Platform Coalition,<sup>1</sup> (hereinafter the “UNE-P Coalition,” “Coalition,” or “Joint Commentors”), through counsel, hereby submits its initial comments in the above-captioned proceeding. The UNE-P Coalition is comprised of 17 companies who have invested more than a billion dollars developing a diverse base of facilities, operational infrastructure and innovative software applications, and business processes, to compete in the local telecommunications market. The common feature among the members of the Coalition is their use of unbundled local switching (“ULS”) in the combination known as the Unbundled Network Element Platform (“UNE Platform” or “UNE-P”) to establish a broad competitive footprint and provide conventional voice services to residential and small business customers not yet positioned to benefit from higher capacity digital services.

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<sup>1</sup> Joint Commentors include Access Integrated Networks, Birch Telecom, Inc., BridgeCom, Broadview, CoreComm Limited, Data Net Systems, DSCI Corporation, IDS Telcom, Inc., InfoHighway Communications Corp., ionex Telecommunications, ITC^DeltaCom, MCG Capital Corp., Metropolitan Telecommunications, nii communications. LTD., Sage Telecom, Inc., Talk America Inc., and TruComm.

## I. INTRODUCTION AND SUMMARY

The UNE-P Coalition submits that, in this Triennial Review proceeding,<sup>2</sup> the Commission must make a realistic appraisal of where the competitive local marketplace that was envisioned by the Congress when it passed the Telecommunications Act of 1996<sup>3</sup> really is today. The Commission makes assumptions and inquiries in the *Triennial Review NPRM*, seemingly oblivious to the fact that Congress has mandated the availability of three competitive modes of entry,<sup>4</sup> and without regard to the fact that the competitive telecommunications market is generally in a financially precarious position.<sup>5</sup> The most recent official statistics compiled by the Commission regarding local competition demonstrate that the number of switched access lines provided by CLECs is in decline in many States. Given the state of the market, the Joint Commentors find it unimaginable that the Commission is even considering whether to contract the national minimum list of unbundled network elements (“UNEs”). In recognition of the tenuous state of the competition that exists today, the Commission should, at a minimum, maintain existing unbundling obligations with respect to each of the current UNEs. Indeed, the Coalition submits that the proper application of the statutory unbundling standard set forth in Section 251 of the 1996 Act compels such a result. Specifically, the Coalition demonstrates that

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<sup>2</sup> *In the Matter of Review of Section 251 Unbundling Obligations of Local Exchange Carriers*, CC Docket No. 01-339, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Notice of Proposed Rulemaking*, 15 FCC Rcd 22781 (rel. Dec. 20, 2001) (“*Triennial Review NPRM*” or “*UNE Triennial Review*”).

<sup>3</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. (“1996 Act”).

<sup>4</sup> The Commission also appears oblivious to the fact that Congress has mandated that loops, local switching and transport be made available on an unbundled basis by the Bell Operating Companies (“BOCs”). See 47 U.S.C. § 271 (c)(2)(B).

<sup>5</sup> Thirty-four publicly traded telecommunications firms filed for Chapter 11 protection in 2001. There were 19 such filings in 2000. To date, only one company (Covad) has come out with an intact business. Washington Post, “*Running in Reverse: Bankrupt Firms Struggle to Survive, Not Grow, in Chapter 11*” p. A1 (Feb. 25, 2002) (Source: BankruptcyData.com). Since January 1, 2002, an additional nine companies have filed for Chapter 11 bankruptcy protection (Source: BankruptcyData.com).

without access to unbundled local loops (“loops”), ULS, shared transport, and operator services and directory assistance (“OS/DA”),<sup>6</sup> CLECs will be materially impaired in any attempt to provide mass-market telecommunications services.

Furthermore, the Coalition proposes that, consistent with the Petition filed by the Promoting Active Competition Everywhere (“PACE”) Coalition on February 6, 2002,<sup>7</sup> and the National Association of Regulatory Utility Commissioners (“NARUC”) Resolution Concerning the States’ Ability to Add to the National Minimum List of Network Elements,<sup>8</sup> the Commission should establish procedures in this proceeding which provide State public utility commissions (“State Commissions”) with a meaningful opportunity to employ their local perspectives in assessing competitive conditions within their jurisdictions.<sup>9</sup> The Coalition submits that, to the extent the Commission ignores the evidence of impairment submitted herein by the Joint Commentors and adopts reduced national minimum unbundling requirements at the conclusion of this proceeding, it should allow State Commissions to continue their role in shaping the markets in their States, and the ability to decide whether and when unbundling obligations should fall to any reduced federal minimum in their State. Such procedures would ensure that

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<sup>6</sup> Although the Commission removed OS/DA from the national minimum list of UNEs subject to the requirement that the ILECs offer “customized routing,” evidence and experience since that decision demonstrate that the ILECs do not offer a customized routing capability that supports widespread competition by new entrants. As we discuss later in these comments, the “customized routing” option offered by the ILECs requires dedicated OS/DA trunk groups at each and every end office, thereby precluding the widespread local competition that UNE-P otherwise makes possible.

<sup>7</sup> See *PACE Coalition Petition*, CC Docket Nos. 01-338, 96-98, 98-147, (filed February 6, 2002).

<sup>8</sup> See *NARUC Resolution, Committee on Telecommunications* (adopted by Board of Directors, Feb. 13, 2002).

<sup>9</sup> See also *Comments of the Massachusetts Department of Telecommunications and Energy*, CC Docket No. 01-338 (filed Mar. 14, 2002); see New Jersey Board of Public Utilities release, “*NJBPU Announces Decision to Spur Competition in New Jersey’s Local Telephone Market*,” noting that the BPU had established a rate for UNE-P of \$13.93 in recognition of the fact that “the availability of UNE-P has taken on additional importance as larger facilities-based carriers have indicated that this will be their primary strategy into the residential local service market.” (Nov. 20, 2001).

federal and State regulators work together to achieve Congress' desire to open local markets, as well as assure that incumbent local exchange carrier ("ILEC") unbundling obligations adopted by State legislatures as an integral component of deregulatory alternative regulation statutes continue to have effect.

Market experience has repeatedly demonstrated that achieving broad competition for the typical residential and small business customer requires access to a full complement of unbundled network elements, including local switching. As demonstrated herein, a UNE-P based local entry strategy has proven successful because it addresses each of the most critical impairments that would otherwise frustrate entrants seeking to offer "mass-market" services. States where local competition is strongest are those States where UNE-P is widely available. Recent decisions by New York, Texas and several other States committing to make UNE-P available, demonstrate the value of the UNE-P entry strategy. The States of New York, Texas, Illinois, Michigan and Pennsylvania, where there is active UNE-P competition, saw CLEC lines grow by 1.3 million in the first half of 2001, while the rest of the nation saw CLEC lines decline by nearly 450,000. This evidence presents compelling reason for the Commission to allow the UNE-P entry model to continue to be deployed nationwide. Elimination of, or further restrictions on, UNEs in this proceeding will only serve to decrease, not increase, local telecommunications competition in the United States, and will foreclose any competitive choice for mass-market residential and small business customers for the foreseeable future.

At the time the Commission decided it would conduct a "triennial review" of its national minimum UNE list, no one could have predicted that in just two short years the competitive landscape would have changed so dramatically. The fundamental lesson of this experience is that the Commission should not prejudge how local competition should evolve, selecting any particular approach as a "favored" strategy. The 1996 Act embraced a market philosophy that



avored *all* entry strategies, with the view that market forces should guide the deployment of investment and the sequence of competitive expansion. The Commission must hold true to this vision, retaining all the basic tools required by entrants – most especially those tools beginning to demonstrate success – and allow the market, which is to say consumers, to decide which strategies and innovations provide lasting benefit. Ultimately, new technologies will likely be necessary to achieve a fully competitive marketplace; but these technologies may never emerge or gain a commercial foothold unless there is a base of competitors pre-positioned to integrate them into their operations. The existing exchange monopoly is the product of more than 100 years of maturation; the Commission will never achieve a competitive local market by fundamentally redefining commercial opportunity every two or three years. A long term change in this market requires a long term commitment to competition.

## **II. JOINT COMMENTORS ARE BRINGING COMPETITION TO MASS-MARKET LOCAL TELECOMMUNICATIONS CUSTOMERS THROUGH THE INTRODUCTION OF UNIQUE AND INNOVATIVE SERVICES**

UNE-P is the foundation of a variety of sophisticated business models that give carriers the ability to provide unique and innovative services to the mass-market. Residential customers and small businesses can be served economically because network elements can be combined to provide innovative services. The ability to profitably serve a far larger cross-section of the local market gives UNE-P providers the potential for growth that is prerequisite for development of additional unique and innovative services that can be marketed to subscribers.

### **A. The First Generation Products And Services**

UNE-P promotes innovation along all non-public switched telephone network (“PSTN”) dimensions (*e.g.*, packet networks, “vertical features,” and other value-added services such as voicemail and unified messaging), which account for a substantial portion of new telecommunications investment. In short, UNE-P enables – and has resulted in – innovation far

beyond the mere replication of existing ILEC services. Indeed, far from "replicating" the incumbents' service, the empirical evidence demonstrates that the ILECs are the ones deploying "copy cat" products to mimic the innovative offerings deployed by UNE-P providers.

UNE-P-based competition in the New York market provides several prominent examples. In June 1999, Z-Tel began marketing a feature-rich, flat-rated local service with a broad calling area bundled with long distance service for just under \$50.00. Z-Tel's bundled offering also includes a "communications manager" that unifies voice mail, email, and provides follow-me functionality. Prior to that time, New York consumers had to buy message-rated local service from Verizon with a very limited calling scope. In response to Z-Tel's bundled service offering, Verizon deployed its "Premium Local Package," which offers "unlimited service within [a] Home Region, unlimited local directory assistance, plus [the] choice of four or more" vertical features.<sup>10</sup> In late September 2001, Verizon announced the release of the "Verizon Unified Communications Service," which Verizon touts as an "innovative offering" that "enables customers to set up a virtual communications hub in minutes, accessible from any location, providing access to voice mail, e-mail, faxes and common files."<sup>11</sup> Z-Tel rolled out this "innovative" offering over two years before Verizon through a combination of Z-Tel's facilities and UNE-P.

In a similar vein, other competitive carriers such as New York-based InfoHighway are deploying broadband packet networks and are utilizing UNE-P as a means of offering consumers traditional circuit-switched voice service in addition to high-speed data services. InfoHighway is investing in broadband facilities, rather than in replicating the ratepayer funded PSTN that the

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<sup>10</sup> See, [www.verizon.com](http://www.verizon.com), Product Description, Premium Local Calling Package - Unlimited.

<sup>11</sup> News Release, Unified Communications Service Available to Displaced New York City Businesses and Consumers (Sep. 28, 2001), available at [www.verizon.com](http://www.verizon.com).

ILECs inherited. Although the ILECs today allege much about broadband competition from so-called intermodal sources, the actual facts demonstrate that but for the deployment of DSL by competitive carriers like InfoHighway, the ILECs would not have begun their own DSL rollouts.

Georgia-based Access Integrated Networks (“AIN”) is innovating along a different dimension. AIN has invested in building state-of-the-art customer care functions, which permit it to consistently answer over 96 percent of its customers’ calls within six seconds. AIN operates in a “no menu,” “no transfer” environment, where the person answering a customer’s call is trained to handle any request or inquiry (*e.g.* repairs, moves, service changes, billing questions). AIN operates statewide in nine southeastern States, serving small business customers in places like Bent Creek, North Carolina; Bean Station, Tennessee; Etowah, Alabama; and Waverly, Georgia. Indeed, serving customers ubiquitously throughout a State is a hallmark of UNE-P-based provision of service. Texas-based Sage Telecom provides service to customers in 310 exchanges in Texas. Ninety-three percent of Sage Telecom’s customers are residential, and they are located predominantly in rural areas and suburban cities and towns outside of the major metropolitan areas of that State.

New York-based BridgeCom markets a bundle of local, long distance, unified messaging and broadband services to small and medium sized businesses utilizing in part its own investment in facilities for data and unified messaging and utilizing UNE-P for ubiquitous availability of local voice services. The BridgeMail product integrates voice mail, email and follow-me functionalities to enhance the value and flexibility of basic telephony services. In addition, BridgeCom has invested heavily in the development of convergent billing platforms, including full integration with a robust and highly automated OSS environment that facilitates the ability to service customers (with a live voice in under 10 seconds) effectively and efficiently. BridgeCom also anticipates first stage deployment of a next-generation Class 5

softswitch facility in the first quarter of 2003 in order to begin to relieve itself of one level of dependency on the ILEC as well as to gain greater ability to provide differentiated and more competitive product offerings to the public.

These are just a few of myriad ways that UNE-P enables competitive carriers to deploy new and innovative services which without question have provoked competitive responses from the ILECs. Innovation and competitive response is what competition is all about, and the Commission must acknowledge that UNE-P is without question an integral part of the development of competition.

In an effort to distract the Commission from the true innovative nature of UNE-P-based offerings, the ILECs will no doubt whine about the need for "real competition" from "facilities-based" companies. Again, any reasonable review of the facts demonstrates what a completely dishonest argument this is. The fact is that all carriers invest in some facilities, and no carrier is purely facilities-based. UNE-P carriers invest in a wide array of facilities, including high-speed data switching and transport networks, back-haul networks, innovative software platforms and billing systems, OSS systems, and customer CARE systems.

Indeed, the Joint Commentors have invested billions of dollars in local telecommunications infrastructure tailored to providing a panoply of distinctive telecommunications services that can be distinguished from the ILECs' menu of offerings, not only on the basis of price, but on the basis of quality, innovation, and suitability to the targeted customer. Accordingly, any emphasis placed on "facilities" deployment must take into account that UNE-P providers are continuously increasing implementation of their own facilities on a market-driven basis consistent with competitive demands.

The ILECs, although they inherited the PSTN, rely on leased facilities as often as any other carrier, including UNE-P providers. For example, when the BOCs enter the interLATA

market, they do not deploy a long distance network. Rather they lease existing network capacity from others. As noted in a recent Credit Suisse First Boston Report:

Sprint carries most of Verizon's long distance voice calls at very attractive wholesale rates, although Verizon carries approximately 30% of its intraState LD traffic on its own network within New York. Data traffic is more dispersed, with some going on Sprint, some on Genuity, and some even to Qwest.

\* \* \*

While it has announced plans for a global network, Verizon will not be deploying its own networks....<sup>12</sup>

This report makes at least one thing patently obvious: when Verizon enters other carriers' markets, it prefers to lease network capacity, rather than build-out a duplicative network. However, when other carriers enter Verizon's monopoly market, Verizon wants them to replicate Verizon's facilities, rather than purchase network capacity from Verizon. Put another way, when the BOCs enter competitive markets, they enjoy the opportunities afforded by a robust wholesale market; however, when competitors attempt to enter the local market, they face reluctant and litigious wholesale providers in the BOCs. The Commission must not let this asymmetry stand.

The most recent official Commission statistics indicate that, as of June 2001, all CLECs -- of all types -- together served only 17.3 million (or 9.0%) of the approximately 192 million switched access lines in service nationwide.<sup>13</sup> The number of CLEC switched access lines provided by resale has been declining steadily over time. In fact, the Commission's latest statistics point out that ILECs provided 4.4 million lines on a resold basis at the end of June 2001, as compared with 5.4 million lines resold at the end of the preceding year. This represents

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<sup>12</sup> CSFB Report, Verizon Communications, June 8, 2001.

<sup>13</sup> See "Local Telephone Competition: Status as of June 30, 2001," FCC Industry Analysis Division, Common Carrier Bureau (rel. Feb. 27, 2002) ("June 2001 Local Competition Report") at 1.

a 23% decline in the course of less than a year.<sup>14</sup> Although ILEC provision of UNE loops grew during the same period, it still amounted to a total of only 8 million lines.<sup>15</sup> In terms of revenue, all competitive carriers captured only about a 8.9% share of the total revenues for local services, with the other 91.1% retained by the ILECs.<sup>16</sup> In short, no matter how these data are manipulated, this is scarcely the robust competitive scenario envisioned by Congress: the statistics indicate that, despite all the *Sturm und Drang*, the situation in the local market over six years after enactment of the 1996 Act remains little changed.

The continued difficulties in local market entry are reflected directly in the performance of competitive providers. In the last two years, a grim backdrop of business failures, bankruptcies, and operational difficulties has set the tone. There have been precipitous drops in shareholder value, and numerous competitive carriers have also sought to restructure their debt.<sup>17</sup> UNE-P based competition, however, has provided a bright spot in this battered market segment.<sup>18</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 4 (data relates to calendar year 2000).

<sup>17</sup> See, e.g. Denise Culver *et al.*, "CLECs Weather Newest Threat: Themselves." *The Net Economy* (Jan. 21, 2002) <http://www.theneteconomy.com/article/0,3658,S%253D904%2526a%253D21489,00.asp>.

<sup>18</sup> This is not to say that UNE-P deployment is not without its challenges. For example, as Sage learned after it had entered the market in Kansas, SWBT has at least one Kansas exchange that is served out of a Missouri switch. At no time during contract negotiations or roll-out conversations did SWBT advise Sage that it would not be able to convert customers in this Kansas exchange. This information was not made available to Sage until Sage had several orders rejected and raised the issue. At that time, SWBT informed Sage that it would not convert these Kansas end users based on Sage's Kansas interconnection agreement and that if Sage wished to convert these end users it must first negotiate a Missouri interconnection agreement. Sage then proceeded to become certified and get an interconnection agreement in Missouri, a process which delayed its serving Kansas customers by several months. During the entire course of the certification process and contract negotiation, SBC failed to communicate that there would be any technical issues with Sage providing service to Missouri customers. Sage has only recently been advised by SWBT that there is a host switch (and five remotes) in Linn, Missouri that does not support SS7 signaling and, therefore, is not AIN-compatible and is not able to support UNE-P service. Sage only received this information after it had submitted at least four UNE-P orders that were rejected. At no time during contract negotiations or roll-out conversations did SWBT advise Sage that it had any switches remaining in its network that did not support SS7 signaling. In fact, Sage has been unable to confirm this information through its research of the LERG. This ongoing lack of information and delay has severely impaired the ability of Sage to serve its customers.

On a nationwide basis, the Commission's latest statistics show that UNE loops provided with ILEC switching have been the fastest growing form of entry.<sup>19</sup> Between June 2000 and June 2001, for example, UNE-P based competition represented over 90% of the growth in competition (UNE-P, UNE-L and Resale) experienced in New York State; indeed, "of the 3.3 million access lines provided by competitors [in New York State], approximately 1.8 million were provided via UNE-P and the vast majority were provided to residential customers."<sup>20</sup>

As competitive carriers demonstrated in the *Texas Arbitration* proceeding,<sup>21</sup> UNE-P based competition explains virtually all of the net gain in local competition in that State since January 2000. Indeed, in the 18 months from January 2000 to June 2001, CLECs in Texas added substantially over 1 million lines employing UNE-P, accounting for more than 94% of the net competitive share gain in that period.<sup>22</sup> In Georgia, from January 2001 through September 2001, loops with switching gained 112,000 lines, while loops without switching added only 6,000 lines.<sup>23</sup> Limiting the availability of local switching is tantamount to placing a governor on local competition itself.

## **B. Second Generation Products And Services**

As explained above, the first generation of UNE-P based entrants are developing a solid foundation in the fundamental skills of telephony and differentiating themselves from the

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<sup>19</sup> June 2001 Local Competition Report, at 2.

<sup>20</sup> See Panel Testimony of NYPSC Staff Charles Dickson, Wayne Brindley, Dan Martin, Dennis Taratus and James Mitchel In Support of Joint Proposal, In the Matter of Verizon-New York, Case 00-1945, p. 15 (Feb. 11, 2002)

<sup>21</sup> See Petition of MCImetro Access Transmission Services LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996, Docket No. 24542, Texas Public Utility Commission, (filed Aug. 22, 2001) ("*Texas Arbitration*").

<sup>22</sup> Rebuttal Testimony of Joseph Gillan in *Texas Arbitration*, filed December 21, 2001.

<sup>23</sup> Source: BellSouth Form 477 Response to the FCC (for December 31, 2000) and Reply Affidavit of Elizabeth Stockdale, Federal Communications Commission, CC Docket No. 01-277 (November 13, 2001).

incumbent, and each other, through a variety of investment and service innovations.

Nonetheless, while significant, these innovations are the product of an industry in its infancy – after all, UNE-P has only been available in a few States for less than three years. The power of this entry strategy has not yet been fully tapped, for the innovations locked within the local network are only just beginning to be explored.

Over the past several years, a silent revolution has been changing the fundamental potential of the exchange network to supply new services and support powerful new applications. The reason that this revolution is *silent* is that competitive forces have not yet unlocked these new capabilities, translating its potential into tangible change. The source of this new ability is the deployment of the Advanced Intelligent Network (AIN) architecture. As explained by Telcordia, the AIN architecture:

... is a service-independent telecommunications network. That is, intelligence is taken out of the switch and placed in computer nodes that are distributed throughout the network. This provides the network operator with the means to develop and control services more efficiently.<sup>24</sup>

In simple terms, AIN technology separates service definition from network resources, in effect creating an applications layer that is distinct from the network layer. The AIN architecture is based on the use of “switch triggers” that suspend call processing to seek further instruction (*i.e.*, service definition) from a remote database. This evolution is roughly comparable to the separation of hardware and software that redefined the computer industry with the introduction of the PC – suddenly, what a computer could do was no longer limited by what computer manufacturers deemed worthwhile.

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<sup>24</sup> Intelligent Networks, Telcordia Technologies, © The International Engineering Consortium, (“Telecordia AIN Tutorial”) [www.iec.org](http://www.iec.org).



Through AIN, the principal inheritance of the incumbent LECs – *i.e.*, the circuit-switched public telephone network – can be transformed to a truly generic transmission and switching platform with service logic defined through centralized databases, rather than individual switches. To fully capitalize on the *potential* of such a network, however, requires an industry structure that promotes experimentation and innovation, rather than revenue protection, as its principal goal.

As the Commission is well aware, DSL technology has been available for many years. Its deployment was frustrated, however, by the interaction of two forces. First, DSL technology threatened the incumbents' other high speed, and high priced, data offerings. Free from the spur of competition, the incumbents had no reason to introduce a service that could cannibalize existing profits. Second, all technologies are only as useful as their applications, and there is an unavoidable synergism that must occur between these dimensions for any new technology to gain acceptance. Large monopolies are not inclined to produce the type of imagination and innovation needed to create new applications. The parallel to DSL in the circuit-switched network, is the power of AIN.

UNE-P based competition fundamentally erases each of these barriers that today limit AIN. Unlike the incumbent, entrants do not have the luxury of protecting their revenues through inaction – entrants must either innovate to gain share or risk the loss of share to other entrants that will. Moreover, nothing frees imagination and the entrepreneurial spirit as much as reduced entry barriers that actually permit the formation of small firms devoted to new ideas.

Whether AIN will ever make a difference to the average consumer or small business will largely depend upon whether the differentiation made possible by the network architecture is matched with an economic system that promotes innovation and the creation of new applications.

The mass-market competition made possible by UNE-P provides that necessary match, but only if the industry is permitted to evolve to its full potential.

To begin, the “conventional” menu of AIN based services – *i.e.*, those services that are already known to be possible in the AIN 0.1 call model<sup>25</sup> -- are not likely to be seen by incumbents as a significant source of new revenues. Consider the following examples:<sup>26</sup>

- \* Customized Dialing Plans. Using the originating switch trigger, AIN can be used to provide a customer with a customized dialing pattern that provides “intercom-like” dialing among multiple locations.
- \* Alternative Routing. Using the terminating switch trigger, incoming calls can be routed to different destinations based on a predefined logic (time of day, day of week) or actions by the subscriber.
- \* Area Calling. Businesses can use a single number with a remote database matching the calling party’s number to the nearest location (for instance, allowing Dominos Pizza to list a single number, while automatically routing calls to the nearest store).
- \* Do Not Disturb. Terminating screening logic can be used to pass some calls through, while routing others (such as telemarketers) to an announcement.

In a monopoly environment, each of the above services would be viewed solely from the perspective of the potential incremental profit it would enable, and would be marketed (and priced) accordingly. In a competitive environment, however, entrants will build basic services

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<sup>25</sup> AIN is being implemented through a schedule of capabilities that have been assigned to various “releases.” AIN 0.1 is the first subset of functionalities of the AIN 1 Release.

<sup>26</sup> These examples are drawn from the Telecordia AIN Tutorial, pages 16 – 22.

that include new capabilities as a means to differentiate themselves from the incumbent, not necessarily as a way to justify higher prices.

More importantly, the universe of AIN-based services will expand significantly once the combined imagination of the competitive process is matched with the basic potential of this architecture. AIN is particularly well-suited to the needs of new entrants because it permits services to be introduced in a centralized manner, thereby reducing entry costs. For instance, new entrants require more efficient ways to offer voice mail services with message-waiting features than the end-office based SMDI links typically required by the incumbent. AIN provides that means by combining off-hook switch triggers with a database to provide an announcement that automatically informs subscribers of messages in queue. A simple innovation to be sure, but one that would bring additional competitive choice and lower prices to a much larger audience.

While the Commission's existing unbundling rules will initially limit entrants to applications that can be developed and housed in the incumbents' service creation environment and Service Control Point ("SCP"), as the industry matures there will be the need to reassess these policies. The critical conclusion, however, is that the industry must be given the *opportunity* to mature, bringing second-generation competition to the "applications layer" in the network.

As noted at the outset, the first generation efforts at UNE-based competition represent the embryonic stage of market development. Telephony skills – marketing, customer support, billing and the complex operational infrastructure needed to provide basic service – are

expensive to create, but provide a critical foundation for future investment. Second generation developments will proceed along a number of dimensions – the deployment of broadband facilities, for instance – including the underutilized dimension of AIN-based applications. Of course, the industry will never evolve beyond its infancy if the incumbents’ efforts to relic their networks (through the reduced availability of network elements) is permitted.

**III. IN GENERAL, THE COMMISSION SHOULD MAINTAIN THE APPROACH ADOPTED IN THE *UNE REMAND ORDER* IN UNDERTAKING ITS UNBUNDLING ANALYSIS AND IN INTERPRETING THE §251(D)(2) ‘NECESSARY AND IMPAIR’ STANDARD**

It was a very short time ago—two years and four months to be exact—that the Commission released the text of its *UNE Remand Order*,<sup>27</sup> in which it responded to the Supreme Court’s January 1999 decision ordering the Commission to reevaluate the unbundling obligations of Section 251 of the 1996 Act.<sup>28</sup> Competitive carriers were relieved that, for the first time since the Act became law, the Supreme Court’s decision and the *UNE Remand Order* had removed many of the uncertainties surrounding the requirements of the ILEC’s Section 251 unbundling obligations, and they would (supposedly) be free to implement their business plans with relative certainty. The Joint Commentors submit that, except for its irrational rule limiting the availability of the local switching UNE, and preventing its use to serve customers with more than

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<sup>27</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd at 3696, 3767, ¶ 153 (1999) (“*UNE Remand Order*”) (emphasis added), *clarified*, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) (“*Supplemental Order Clarification*”).

<sup>28</sup> *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999). The Supreme Court upheld the majority of the Commission’s rules implementing the Act, including the Commission’s jurisdiction to implement Sections 251 and 252, the Commission’s definitions of network elements, and the Commission’s rule requiring ILECs to offer combinations of unbundled network elements that are already combined. However, the Court required the Commission to “give some substance” to the “necessary” and “impair” standards in Section 251(d)(2), and to develop a limiting standard “rationally related to the goals of the Act.”

three lines in certain of the nation's 50 largest cities,<sup>29</sup> the Commission's unbundling analysis set forth in the *UNE Remand Order* is essentially sound, and the Coalition submits that in this proceeding the Commission should maintain the unbundling analysis adopted therein, and continue to make available the same list of UNEs as it previously ordered be provided, with some clarifications.

In doing so, the Commission must take into account that Congress has spoken (at least with respect to the Books) as to what the minimally acceptable level of unbundling must be, requiring in items four through six of the Competitive Checklist contained in Section 271 that loops, transport, and switching be provided on an unbundled basis.<sup>30</sup> Although the Commission decided in the *UNE Remand Order* "that the prices, terms and conditions set forth under sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of section 271,"<sup>31</sup> that finding makes no sense. Congress clearly intended that unbundled network elements be offered at cost-based rates, and the Competitive Checklist sets forth minimum unbundling obligations that apply to the BOCs. It would be irrational for Congress to have required the BOCs to offer loops, transport and switching, while at the same time excluding these critical elements from the Act's pricing provisions. Consequently, the

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<sup>29</sup> Specifically, 47 C.F.R. § 51.319(c)(2) states: Notwithstanding the incumbent LEC's general duty to unbundle local circuit switching, an incumbent LEC shall not be required to unbundle local circuit switching for requesting telecommunications carriers when the requesting telecommunications carrier serves end users with four or more voice grade (DS-0) equivalents or lines, provided that the incumbent LEC provides nondiscriminatory access to combinations of unbundled loops and transport (also known as the "Enhanced Extended Link") throughout Density Zone 1, and the incumbent LEC's local circuit switches are located in:

- The top 50 Metropolitan Statistical Areas as set forth in Appendix B of the *Third Report and Order* and *Fourth Further Notice of Proposed Rulemaking* in CC Docket No. 96-98; and
- In Density Zone 1, as defined in Sec. 69.123 of this chapter on January 1, 1999.

<sup>30</sup> 47 U.S.C. § 271(c)(2)(B).

<sup>31</sup> *UNE Remand Order*, 15 FCC Rcd at 3905, ¶ 469.

Commission must adhere to the minimum requirements established by Congress with respect to these mandatory elements.

In this proceeding, the Commission specifically seeks comment on whether it should consider “intermodal”<sup>32</sup> competitive alternatives to the incumbent’s network as part of its 251(d)(2)(B) unbundling analysis.<sup>33</sup> The Commission stated that:

Although Section 251(d)(2)(B) does not require technological neutrality explicitly, it contains no reference to the types of technology that the Commission must consider in unbundling the network. In the *UNE Remand Order*, the Commission did consider alternative technologies as part of the ubiquity and quality factors in its impairment analysis, but found that mobile telephones and fixed wireless were ‘not yet viable alternatives to the incumbent’s wireline loop facilities.’<sup>34</sup>

As an initial matter, the Joint Commentors observe that the Commission’s inquiry regarding whether it should consider “intermodal” alternatives as part of its unbundling analysis is not novel. In fact, consideration of “intermodal” alternatives, although not referred to as such, are ostensibly part of the Commission’s existing unbundling analysis. In fact, in the *UNE Remand Order*, the Commission found that in order to evaluate whether a particular element must be unbundled, the Commission’s analysis would examine the availability of elements “from all sources,” including third-party suppliers and those available through self provisioning.<sup>35</sup>

However, the Commission’s “intermodal” inquiry in this proceeding is somewhat troublesome to the Coalition inasmuch as it indicates a surprising misapprehension of the Act by the Commission. That is, the Commission seems to be asking “can the *service* that the

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<sup>32</sup> The Commission defined “intermodal competition” as the competing provision of services over alternative technological platforms. *Triennial Review NPRM*, 15 FCC Rcd 22794 at fn. 73.

<sup>33</sup> See *Triennial Review NPRM*, 15 FCC Rcd at 22794, ¶¶ 27-28.

<sup>34</sup> *Id.*, at ¶ 28.

<sup>35</sup> *UNE Remand Order*, 15 FCC Rcd at 3727, ¶ 56.

requesting carrier seeks to provide be provided through some alternative technological platform.” However, this is not even close to the inquiry that Congress asks the Commission to make in Section 251(d)(2)(B). That section asks whether “the failure to provide access to *such network elements* would impair the ability of the telecommunications carrier seeking to provide the *services that it wishes to offer*.”<sup>36</sup> That is, the Commission must focus on whether there are interchangeable network elements available from sources other than the ILEC. A UNE should be considered “interchangeable” only if its use imposes on requesting carriers no *material* decrease in functionality or quality, increase in cost, limitation of scope, or delay in bringing a competitive service offering to market.

The Coalition submits that substitution of an interchangeable network element should be virtually undetectable by CLEC customers. In cases where such interchangeable network elements are available in a fully functioning, competitive wholesale network element market, a CLEC’s inability to obtain unbundled access to an ILEC’s network element will not impair its ability to compete and deliver its services to its consumers. Accordingly, the real question the Commission must ask is: to the extent that a CLEC wishes to provide basic local voice service using local loops, is there *any other source* outside the ILECs’ network where the CLEC may obtain *such interchangeable network elements*. The inquiry is not, as the Commission suggests, is there any other technological platform, outside of the network elements provided by the ILEC, that would allow some other CLEC the opportunity to provide the services it seeks to offer. Accordingly, the Joint Commentors submit that the Commission’s “intermodal” inquiry, while potentially useful for other policy making purposes, has no place in a proper Section 251(d)(2)(B) unbundling inquiry.

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<sup>36</sup> 47 U.S.C. § 251(d)(2)(B) (emphasis added).

**A. The Commission's Interpretation Of The Statutory 'Necessary And Impair' Standard In The UNE Remand Order Is Generally Sound And Should Be Maintained.**

In the *UNE Remand Order*, the Commission adopted a 'necessary' and 'impair' analysis that remains valid today, and the Joint Commentors submit that it should be adopted once again in this proceeding. There, the Commission concluded that the ILECs' failure to provide access to a non-proprietary network element "impairs" a requesting carrier within the meaning of Section 251(d)(2)(B) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element *materially diminishes* a requesting carrier's ability to provide the services it seeks to offer.<sup>37</sup> In order to evaluate whether there are alternatives actually available to the requesting carrier as a practical, economic, and operational matter, the Commission stated that it would look at the totality of the circumstances associated with using an alternative, considering

- (i) Cost, including all costs that requesting carriers may incur when using the alternative element to provide the services it seeks to offer;
- (ii) Timeliness, including the time associated with entering a market as well as the time to expand service to more customers;
- (iii) Quality;
- (iv) Ubiquity, including whether the alternatives are available ubiquitously; and
- (v) Impact on network operations.<sup>38</sup>

<sup>37</sup> The Commission will consider the totality of the circumstances to determine whether an alternative to the incumbent LEC's network element is available in such a manner that a requesting carrier can provide service using the alternative. 47 C.F.R. §51.317(b)(1) (emphasis added).

<sup>38</sup> *UNE Remand Order*, 15 FCC Rcd 3734-3745, ¶¶ 72-100.



The Joint Commentors submit that the ‘materially diminish’ standard and the factors previously identified by the Commission should serve as the basis for the unbundling analysis to be conducted by the Commission in this proceeding. And, as discussed in Section IV, application of this unbundling framework, in conjunction with other provisions of the Act, should result in adoption of a national minimum UNE list which leaves to the States the determination of whether and when any decreased unbundling obligations become effective in their State.

**B. The Existence (Or Lack) Of A Wholesale Market For An Element Is A Key Indicator Of Competition**

In re-adopting its interpretation of the impair standard, the Coalition submits that the Commission again must focus on whether a requesting carrier’s ability to compete materially will be materially diminished if it is unable to obtain unbundled access to a particular network element. This effectively requires the Commission to determine whether a fully functioning, competitive, *wholesale* market exists for a requested network element. If a wholesale market for a network element has developed sufficiently, carriers should be able to obtain interchangeable network elements from sources other than the ILECs.

While a nascent market for a few UNEs may exist in some places today, a wholesale market must be robust, sustained and, most importantly, ubiquitous, to be taken into account when determining whether the impairment standard is met. No such market exists for any UNEs today.

**C. The ‘Necessary And Impair’ Standard, Including The Public Interest, And The ‘Materially Diminish’ Analysis Can Only Be Considered by the Commission, Along With Other Factors, To Expand the National Minimum List Of UNEs**

In the *UNE Remand Order* the Commission correctly noted that Congress, in adopting the language of Section 251(d)(2) (to “consider *at a minimum*” the “necessary” and “impair”

standards), contemplated that the Commission would consider *additional factors* in delineating the precise unbundling obligations of the ILECs. In addition, the Supreme Court's remand decision required the Commission to apply a limiting standard to the unbundling obligations of ILECs which is "rationally related to the goals of the Act."<sup>39</sup> Accordingly, in the *UNE Remand Order*, the Commission concluded that in conducting its unbundling analysis, it would consider other factors, in addition to those set forth above, in defining a national list of UNEs.<sup>40</sup> The Commission noted that it would consider the following:

- Promotion of Facilities-Based Competition, Investment and Innovation

The Commission noted that it would consider the extent to which unbundling obligations would encourage the development of facilities-based competition by CLECs, as well as *innovation and investment* in services, including advanced services.

- Rapid Introduction of Competition in All Markets

The Commission correctly noted that the availability of an unbundled network element is likely to encourage requesting carriers to enter the local market in order to serve the greatest number of consumers as rapidly as possible.<sup>41</sup>

- Reduced Regulation

The Commission stated that it would consider the extent to which it can encourage investment and innovation by reducing regulatory obligations to provide access to network

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<sup>39</sup> *Iowa Utils. Bd.*, 119 S.Ct. 721, 734 (1996).

<sup>40</sup> 47 C.F.R. §51.317(b)(3).

<sup>41</sup> The Commission stated that the Section 271 checklist obligations, requiring the BOCs to demonstrate that they are providing loops, switching, transport, signaling and databases, and operator services/directory assistance in order to obtain in-region, interLATA approval, "sheds some light on what Congress believed was required to open local markets to competition. Accordingly, we believe that we may consider whether requiring all incumbent LECs to unbundle these same elements would promote the rapid introduction of competition on a nationwide basis."

elements, as alternatives to the incumbent LECs' network elements become available in the future.

- Certainty in the Market

The Commission stated that in conducting its unbundling analysis, it would be important to provide new entrants with uniformity and predictability in order to develop national and regional business plans, as well as providing financial markets with reasonable certainty so that carriers can attract the capital they need to execute their business plans to serve the greatest number of consumers.

- Administrative Practicality

The Commission noted that it would take into account the administrative manageability of the unbundling rules for both the Commission and the States to apply. The Commission concluded that the adoption of administratively workable unbundling rules would enable the Commission and the States to implement and enforce unbundling rules more efficiently, thereby "facilitating the ability of CLECs to enter the market as quickly and efficiently as possible."<sup>42</sup>

The Joint Commentors submit that each of the foregoing considerations are just as valid today, if not more so, than they were when the Commission adopted them in the *UNE Remand Order*, and the Commission ought to maintain these factors and utilize them as it conducts its unbundling analysis in this proceeding. However, in doing so, the Commission must apply these additional factors in a manner that is consistent with the statutory 'necessary and impair' standard and may not employ them to 'trump' a finding of impairment.

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<sup>42</sup> *UNE Remand Order*, 15 FCC Rcd at 3746-3747, ¶ 105-106.

**D. The Commission Must Take Into Consideration The Public Interest In Applying The Unbundling Standard**

Sections 201 and 251(h) empower the Commission to prescribe any rules and regulations necessary, in the public interest, to carry out the provisions of the Act.<sup>43</sup> As the record of this proceeding will ultimately demonstrate, the unbundling proposed by the Joint Commentors is without question necessary to further the public interest and achieve mass-market competition. Indeed, any restrictions upon, or reduction of the unbundling now required by the Commission would restrict, rather than expand competition and therefore would not be consistent with the public interest.

Widespread availability of UNE-P has unassailably furthered the public interest in the United States. The record is clear that without UNE-P, significant numbers of lines attributed to competitive entry by CLECs would not exist, especially in the small business and residential markets. As such, the Commission should continue to require the unbundling of all elements currently on its list of nationally required elements. The public interest similarly demands that the Commission lift its restrictions upon the local switching UNE in order to allow UNE-P carriers to serve mass-market customers throughout the United States. The record in this proceeding will demonstrate that under any reasonable application of the Commission's unbundling guidelines to the factual circumstances in any geographic market, CLECs face material impairment in seeking to serve mass-market customers in any location and of any size in an ILEC's footprint without access to ULS.

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<sup>43</sup> 47 U.S.C. §§ 201, 251(h).

**E. The Commission Must Take Into Account State Statutes Granting Unbundling Authority And State Retail Pricing Regimes**

In addition to the above factors, the Commission must continue to allow States to consider whether the national minimum unbundling obligations promulgated by this Commission are consistent with the State's retail regulation regime and State unbundling obligations. State Commissions must have the ability to examine whether the minimum federal requirements are sufficient to ensure that they achieve the pro-competitive goals of the respective State telecommunications statutes and the regulatory/deregulatory framework that applies to the ILECs in their State, or whether additional unbundling is warranted.

For example, the Texas Legislature has expressly granted the Texas Public Utility Commission the authority to enforce both the FCC's existing unbundling rules, and to adopt additional unbundling rules, upon a finding that such additional unbundling has competitive merit and would further the public interest. The Texas statute states:

**MINIMUM UNBUNDLING REQUIREMENT.**

At a minimum, an incumbent local exchange company shall unbundle its network to the extent the Federal Communications Commission orders.<sup>44</sup>

**COMMISSION UNBUNDLING ORDERS.**

(a) The commission may adopt an order relating to the issue of unbundling of local exchange company services....

(b) Before ordering further unbundling, the commission must consider the public interest and competitive merits of further unbundling.<sup>45</sup>

Thus, in addition to federal authority, the Texas Commission has ample State authority to require SBC to unbundle its network to a greater extent than required under the Commission's rules.

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<sup>44</sup> Texas Public Utility Regulatory Act, Chapter 60, Subchapter B, § 60.021.

<sup>45</sup> *Id.*, § 60.022.

The Illinois Public Utility Act recently classified certain of Ameritech Illinois' small business services as competitive through a comprehensive amendment that also ensured that the full menu of network elements would be available to competitors to serve small businesses.<sup>46</sup> Similarly, the New York Public Service Commission, in a proceeding examining its retail regulation of Verizon, concluded that Verizon should be required to provide various wholesale and retail offerings – including unrestricted access to ULS to serve customers with 18 lines or less – in exchange for additional retail pricing flexibility.<sup>47</sup> This Commission, in analyzing the Act's unbundling requirements, must respect the States' ability and need to address the local market conditions present in their respective States.

**IV. THE COMMISSION'S CONCLUSION THAT THE UNBUNDLING ANALYSIS CONDUCTED AS PART OF THIS TRIENNIAL REVIEW SHOULD BE MORE 'GRANULAR' IS NOT ADMINISTRATIVELY PRACTICAL AT THE NATIONAL LEVEL**

As a threshold matter, the Joint Commentors see potential merit in the concept of a more sophisticated and granular analysis of the ILECs' unbundling obligations. However, they question whether the Commission is in the best position to adduce these facts, particularly when they may vary considerably from location to location. The nature of a 'notice and comment' rulemaking proceeding does not naturally lend itself to the development of the empirical record contemplated here. Notice and comment proceedings, which are typically conducted exclusively through the submission of written documents (initial and reply comments, and ex parte filings) do not include the discovery, witness testimony, and cross examination on the record that are the basic vehicles used by State regulators to test veracity and resolve complex factual issues. The

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<sup>46</sup> Illinois Public Utility Act, Section 13-502.5.

<sup>47</sup> See Case 00-C-1945, *Verizon New York, Inc.—Proceeding to Consider Cost Recovery and to Investigate Future Regulatory Framework*; Case 98-C-1357, *New York Telephone Company—Rates for Unbundled Network Elements*, New York Public Service Commission, Order Instituting Verizon Incentive Plan (issued Feb. 27, 2002).

Coalition questions whether the confines of a rulemaking docket provide the Commission with the tools needed to fully develop the facts.

**A. The Commission Should Adopt The PACE Proposal And Allow States The Opportunity To Review The Appropriateness Of Any Reduced Unbundling Obligations**

The Commission is a national body charged with establishing requirements that are uniform throughout the nation. It is by definition and design removed from the local conditions that the Commission itself agrees should inform any decisions reached regarding future UNE availability. Furthermore, a single ‘one size fits all’ rule governing access to UNEs may not be the most appropriate outcome to the UNE review process. The Commission acknowledges this by specifically seeking comment on whether or not to adopt different rules based upon a variety of criteria, including physical location, customer type, and/or type of carrier providing service.<sup>48</sup> However, the more granular the inquiry, the more dependent that inquiry is on the detailed factual data that is difficult to develop and impossible to verify in a ‘notice and comment’ proceeding. Indeed, in the *Triennial Review NPRM*, the Commission itself “recognize[s] that State commissions may be more familiar than the Commission with the characteristics of markets and incumbent carriers within their jurisdictions, and that entry strategies may be more sophisticated in recognizing regional differences.”<sup>49</sup>

The Commission intends to use the standards developed in the *UNE Remand Proceeding* as the “building blocks” of the *UNE Triennial Review*, while incorporating “the technological advances and marketplace changes that have taken place during the interim.”<sup>50</sup> The factors previously identified by the Commission as essential to an impairment analysis are highly fact-

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<sup>48</sup> *Triennial Review NPRM*, 15 FCC Rcd at 22798, ¶ 35.

<sup>49</sup> *Id.*, at 22815, ¶ 75.

<sup>50</sup> *Id.*, at 22789, ¶ 15.

specific and may vary from geographic region to geographic region.<sup>51</sup> The Commission proposes in the *UNE Triennial Review* to conduct an even more refined and fact-specific analysis. The Commission seeks comment on applying the unbundling analysis to (1) specific services; (2) specific geographic locations; (3) differing facilities; (4) specific customer types; and (5) requesting carrier type.<sup>52</sup> In particular, the Commission seeks comment on whether and how to take geography into account in the unbundling analysis, asking specifically whether political boundaries, metropolitan statistical areas (“MSAs”), density zones, or other delineations are the proper geographic delineations for determining impairment.<sup>53</sup> More generally, it strongly encourages parties to submit evidence of actual marketplace conditions, indicating that evidence of that type “will be considered more probative than other kinds of evidence.”<sup>54</sup>

The Coalition believes that the best course of action is one where this Commission and State regulators each focus their efforts on what they do best. For the Commission, this means utilizing the *UNE Triennial Review* to adopt a national list of UNEs that represents the *minimum* unbundling requirements necessary to give effect to the congressional policy embodied in the 1996 Act. For the State Commissions, this means assuming the responsibility to apply local conditions to determine whether the minimum federal requirements should be permitted to take effect in their State, including determining whether any reduced federal minimums achieve the

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<sup>51</sup> Those factors were (1) the costs incurred using alternatives to the incumbent’s network; (2) delays caused by the use of alternative facilities; (3) material degradation in service quality; (4) the ability of a requesting carrier to serve customers ubiquitously using its own facilities or those acquired by third-party suppliers; and (5) the impact that self-provisioning a network element or obtaining it from a third-party supplier may have on network operations.

<sup>52</sup> *Id.* at 22798, ¶ 35. In seeking comment on applying the unbundling analysis to specific services, the Commission solicits input on how to factor in the level of competition for a particular service. *Id.* at 22799, ¶ 38.

<sup>53</sup> *Id.* at 22799, ¶ 39.

<sup>54</sup> *Id.* at 22789, ¶ 17.



pro-competitive goals of their own State statutes and the regulatory/deregulatory framework that applies to the ILECs in their State, or whether additional unbundling is warranted.<sup>55</sup>

Accordingly, the Joint Commentors agree with the PACE Coalition that the Commission should adopt a baseline national list of UNEs in the *UNE Triennial Review* that define the ILECs' minimum obligations and it should leave to each State the decision as to whether those minimum requirements – to the extent they constitute lesser unbundling obligations than those that exist today – should be permitted to take effect in their State.<sup>56</sup> Of course, States would remain free to require additional unbundling. The process outlined herein is the best way to balance national minimum requirements developed by the Commission on the basis of generic information with more specific rules which reflect actual local marketplace conditions adopted by the States.

Today, the vast majority of exchange revenues are the responsibility of State regulators, not the FCC. Based on ARMIS data for 2000, 70% of the ILECs' regulated revenues are regulated by the States, with more than 90% of the ILECs' interstate revenues related to a single service, *i.e.* access. The uncontested conclusion is that the States have the *effective* responsibility for the local marketplace, even though federal minimum standards do apply.

An important consequence of these statistics is that there is a significant potential for harm if there is a disconnect between the degree of local competition in a State and the amount of retail price deregulation the ILEC enjoys in that State. Only the States are in the position to

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<sup>55</sup> See *Comments of the Public Utility Commission of Texas*, CC Docket 01-338 (filed Mar. 14, 2002) (“The Texas PUC believes that States remain in the best position to recognize the ‘characteristics of markets and incumben carriers within’ Texas, and the entry strategies that have worked best.”)

<sup>56</sup> A State would be free at any time to decide on its own motion to initiate a docket to review whether a UNE or UNEs should continue to be required. A docket could also be initiated upon petition by an interested party. If a docket is triggered by the filing of a petition by an entity requesting that a UNE or UNEs be restricted or eliminated, that party would have the burden of proof that carriers would not be impaired if access were restricted or eliminated.

fully understand the interrelationship between retail price regulation and local competition and to guard against an outcome where consumers lose the protection of regulation without first enjoying its preferable alternative, *i.e.* competition. Moreover, State Commissions have the real-world expertise and experience with local competition that is essential to reasoned decision-making. The Commission should not risk squandering the unique talents and expertise of the individual States in favor of a 'one size fits all' federal system. The Commission asks in the *Triennial Review NPRM* whether the "States [are] better situated to tailor unbundling rules that more precisely fit their markets?"<sup>57</sup> That question should certainly be answered in the affirmative with respect to action beyond the federal minimum requirements, for both Congress and the Commission have recognized that the Act did not intend for federal action to supplant consistent State actions promoting local competition.

**B. Facts May Vary Significantly From Geographic Area To Geographic Area, And The States Are Best Positioned To Conduct The Fact-Specific Inquiry Contemplated By The Commission**

The Commission acknowledged the significant role played by the States prior to enactment of the 1996 Act and the continuing role to be played by the States in implementing local competition in its August 1996 *Local Competition Order*:

Virtually every decision in this Report and Order borrows from decisions reached at the State level, and we expect this close association with and reliance on the States to continue in the future. We therefore encourage States to continue to pursue their own pro-competitive policies. Indeed, we hope and expect that this Report and Order will foster an interactive process by which a

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<sup>57</sup> *Id.*, at 22816, ¶ 76.

number of policies consistent with the 1996 Act are generated by the States.<sup>58</sup>

Significantly, the national experiment with local competition is still under way, with the States continuing to supply the differentiation and inventiveness needed for the evolution of competition to continue. The Commission must assure that its *UNE Triennial Review* proceeding not disrupt this process. While national minimum standards provide a useful floor to the competitive experiment, that floor is no substitute for considered State actions promoting competition.

There should be no question that the States are in the best position to judge the competitive needs of their markets (above the national minimums). State regulators (a) have access to the detailed real-world information that is essential to reasoned decision-making on this issue, (b) employ procedures (such as discovery and cross examination) that are most compatible with fact-finding and verification, and (c) are in the best position to balance competitive policies with the regulatory/deregulatory framework that governs ILEC in their State. Moreover, in many States, ILECs have gained regulatory flexibility through State statutes that contemplate more robust competition than would result through application of national minimum standards.<sup>59</sup> As explained below, the States should determine whether any reduction in federal minimums

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<sup>58</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, para. 53 (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3<sup>rd</sup> 1068 (8<sup>th</sup> Cir. 1997) and *Iowa Utilities Board v. FCC*, 120 F.3<sup>rd</sup> 753 (8<sup>th</sup> Cir. 1997), *aff’d in part and remanded, AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), *on remand, Iowa Utilities Board v. FCC*, 219 F.3<sup>rd</sup> 744 (8<sup>th</sup> Cir. 2000), *petitions for writ of certiorari granted, Verizon Communications, Inc. v. FCC*, 121 S. Ct. 877 (2001); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further reconsideration pending.

<sup>59</sup> For instance, the Illinois Public Utility Act recently classified certain of Ameritech Illinois’ small business services as competitive through a comprehensive amendment that also ensured that the full menu of network elements would be available to competitors to serve small businesses. Illinois Public Utility Act Section 13-502.5.

should be implemented in their jurisdiction, because only the States are able to comprehensively consider the effect of any potential reduction on consumers within their boundaries.

**C. The FCC Should Reaffirm That Its UNE List Is A National Minimum, And It Should Be Left To The States To Determine Whether And When Any Decreased Unbundling Obligations Become Effective In Their State**

The role outlined for the States in the PACE Coalition Petition is consistent with the 1996 Act and the Commission's decisions interpreting the statute. Indeed, Section 251(d)(3) of the Act provides State regulators with the authority to establish additional unbundling obligations, so long as those obligations comply with subsections 251(d)(3)(B) and (C).<sup>60</sup> Section 251(d)(3) states:

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State Commission that:

- (A) establishes access and interconnection obligation of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

In the *UNE Remand Order*, the Commission held that Section 251(d)(3) grants State regulators the authority to impose obligations upon ILECs beyond those imposed by the national UNE list adopted by the Commission in that order, so long as the additional State-imposed obligations "meet the requirements of Section 251 and the national policy framework instituted in [that] Order."<sup>61</sup> There can be no question that a State-conducted proceeding which applies the 'impair' analysis to a UNE before its availability is restricted or eliminated in a State is entirely

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<sup>60</sup> In addition, many States have independent authority under their own governing statutes to order unbundling without reliance on the 1996 Act.

<sup>61</sup> *UNE Remand Order*, 15 FCC Rcd at 3767, ¶ 154.

consistent with Section 251(d)(3), and the FCC's Rule 51.317 recognizes as much.<sup>62</sup> While such proceedings may result in States reaching conclusions regarding impairment that are different that those reached by the Commission when it establishes national minimum unbundling requirements, such results would not be inconsistent with the Act or the Commission's rules.<sup>63</sup> A State also may have independent authority under State law to require additional unbundling through application of the standard adopted by the State legislature.<sup>64</sup> Such additional unbundling would also be consistent with the Act.

A decision by the Commission to adopt this decision-making process would be consistent with the roles already being played by several leading States. For example, the Texas PUC, in the recently-concluded *Texas Arbitration*, is about to release a decision finding that ULS and OS/DA should continue to be offered as network elements on an unrestricted basis in that State.<sup>65</sup> Similarly, the Pennsylvania Public Utility Commission ("PA PUC") has determined that local switching (as well as the other elements that form the UNE Platform) should be available as UNEs to serve small businesses until December 31, 2003.<sup>66</sup> Furthermore, the Illinois Commerce

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<sup>62</sup> 47 C.F.R. § 51.317(b)(4).

<sup>63</sup> Sections 261(b) and (c) reinforce the important role of the States. They provide:

(b) EXISTING STATE REGULATIONS – Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) ADDITIONAL STATE REQUIREMENTS – Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intraState services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part. 47 U.S.C. § 261 (b) and (c).

<sup>64</sup> See e.g., *Texas Public Utility Regulatory Act ("PURA")*, Chapter 60, Subchapter B.

<sup>65</sup> See *Texas Arbitration*, Docket No. 24542. The Texas PUC has also voted to require SWBT to combine UNEs that it currently combines even if the requested combination is not already physically connected in the SWBT network.

<sup>66</sup> *Opinion and Order*, Docket Nos. P-00991648 and P-00991649, Pennsylvania Public Utility Commission, (August 26, 1999), page 85. "Small business" is defined as any business with total billed revenues from local and intraLATA toll services at or below \$80,000.00 annually.

Commission (“ICC”) is in the process of implementing the new Illinois Public Utility Act, which specifically requires ILECs under alternative regulation to offer “...a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service...without the requesting telecommunications carrier’s provision or use of any other facilities or functionalities.”<sup>67</sup> The New York Public Service Commission recently adopted an order, reached through an industry-wide negotiation process, which requires Verizon to make the UNE-Platform available on an almost completely unrestricted basis.<sup>68</sup> Finally, State Commissions in Georgia and Tennessee have been asked to conduct State-specific impairment analyses to determine the availability of local switching in their States.<sup>69</sup>

The Joint Commentors recommendation is consistent with the rationale used by the Competitive Telecommunications Association (“CompTel”) in suggesting a substantive role for State Commissions in the *UNE Triennial Review*.<sup>70</sup> CompTel cites the “data-intensive” and

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<sup>67</sup> Illinois Public Utility Act § 13-801(d)(4).

<sup>68</sup> See Case 00-C-1945, *Verizon New York, Inc.—Proceeding to Consider Cost Recovery and to Investigate Future Regulatory Framework*; Case 98-C-1357, *New York Telephone Company—Rates for Unbundled Network Elements*, New York Public Service Commission, Order Instituting Verizon Incentive Plan (issued Feb. 27, 2002) (Under the Order, UNE-P is available on an unrestricted basis to CLECs throughout Verizon’s territory. Prior to the adoption of the Order, in 17 central offices (mostly in Manhattan, as well as parts of Nassau, Niagara, Suffolk and Erie Counties) UNE-P was subject to line count restrictions imposed by the PSC in 1999, and subsequently, subject to the FCC’s 4-line rule. Under the terms of the Order, Verizon agreed to waive those restrictions, including the FCC’s 4-line rule, and in those 17 central offices, CLECs may serve residential and small business customers with 18 or fewer lines. In the rest of the State, there are still no restrictions on the number of lines that may be served via UNE-P). In March 2004, the PSC will open a proceeding to examine both UNE rates, and the status of competition in the State. To the extent that the PSC concludes therein that competition has not adequately developed, the terms of the Verizon Incentive Plan, including UNE-P availability, will be adjusted accordingly.

<sup>69</sup> See *In re: Petition of Tennessee UNE-P Coalition to Open Contested Case Proceeding to Declare Unbundled Switching on Unrestricted Unbundled Network Element*, Tennessee Regulatory Authority, Docket No. 02-00207; *In the Matter of The Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements*, Georgia Public Service Commission, Docket No. 14361-U.

<sup>70</sup> *Petition of the Competitive Telecommunications Association*, CC Docket No. 96-98 (filed November 26, 2001), page 6.

“State-specific nature of the issues that will be addressed” in the *UNE Triennial Review* as the reason State regulators’ involvement in the process is so important.<sup>71</sup> The Joint Commentors agree, and urge the Commission to explicitly recognize the necessary interplay between a national minimum list of UNEs and the States’ legitimate authority to require additional unbundling -- through adoption of the process suggested in these comments.

**D. Numerous State Commissions Have Required ILECs To Provide New Combinations of Network Elements**

State Commissions across the country have exercised their authority to require additional unbundling by requiring ILECs to make UNEs that the ILECs ordinarily combine for themselves available to competitors, reflecting the notion that the *Iowa Utilities Board*<sup>72</sup> line of cases does not compel an opposite outcome. The Michigan Public Service Commission, for instance, agreed with the CLECs’ view that ordinarily combined network elements be made available, rejecting Ameritech’s position as anti-competitive:

The Commission determines that defining existing UNE-P and EEL combinations to include those configurations that Ameritech Michigan “ordinarily combines” is more persuasive than Ameritech Michigan’s definition. Ameritech Michigan’s position would permit it to withhold from CLECs the types of UNE combinations that it routinely assembles to provide service to its own retail customers. To accept a definition as restrictive as this would confer an unfair advantage on Ameritech Michigan by allowing it to leverage its control of telephone network facilities in competing with CLECs to fulfill routine requests for retail service. As a matter of policy, the objective of promoting local competition in Michigan would not be well served by this [Ameritech’s] definition. The Commission finds that Ameritech Michigan should define and provide for existing combinations in both its tariff and the M2A to include the types of situations encompassed by the CLECs’ “ordinarily combined” standard.<sup>73</sup>

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<sup>71</sup> *Id.* at page 7.

<sup>72</sup> *See* fn. 28, *supra*.

<sup>73</sup> Opinion and Order, *In the Matter, on the Commission’s Own Motion; to Consider Ameritech Michigan’s Compliance With the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996*, Michigan Public Service Commission, Case No U-12320 at 9-10 (Jan. 4, 2001).

The Indiana Utility Regulatory Commission has reached a similar conclusion in two separate proceedings that use State law authority to order Ameritech to combine UNEs.<sup>74</sup> The Wisconsin Public Service Commission determined, in an AT&T/Ameritech Wisconsin arbitration decision, that it had State law authority to order Ameritech Wisconsin to combine UNEs: “it is just and reasonable, and in the public interest, convenience, and necessity to order Ameritech to make available EELS (both new and by special circuit conversion) and UNE-Ps (both new and existing combinations) at prices and on such terms and conditions that are reasonable because competition will be enhanced, consumer choices increased, and existing telecommunications facilities will be efficiently utilized.”<sup>75</sup>

Most recently, the ICC ruled that it has the legal authority (both as a matter of independent State law and federal law) to order Ameritech to provide combinations of unbundled network elements ordinarily combined in its network, and that public policy commands that Ameritech be required to provide such combinations if the ICC is to promote mass-market competition for Illinois residential and small business customers.<sup>76</sup> The ICC required Ameritech to provide CLECs with combinations of unbundled network elements that Ameritech ordinarily

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<sup>74</sup> Indiana Utility Regulatory Commission, Cause No 40571-INT-03 (Nov. 20, 2000); *Order on UNE Tariff, In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection Service, Unbundled Elements, and Transport and Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes*, Indiana Utility Regulatory Commission, Cause No. 40611 (Jan. 18, 2001).

<sup>75</sup> *Investigation Into Ameritech Wisconsin Operational Systems Support*, Wisconsin Public Service Commission, Docket 6720-TI-160 (Sept. 25, 2001) (“*Wisconsin Order*”) at 9; *see also* Arbitration Award, *Petition for Arbitration to Establish an Interconnection Agreement Between Two AT&T Subsidiaries, AT&T Communications of Wisconsin, Inc. and TCG Milwaukee, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin)*, Wisconsin Public Service Commission, Docket No. 05-MA-120, at 21-22 (Oct. 12, 2000) (“*Wisconsin AT&T/Ameritech Arbitration Award*”).

<sup>76</sup> *Investigation into the Compliance of Illinois Bell Telephone Company with the Order in Docket 96-0486/0569 Consolidated Regarding the Filing of Tariffs and the Accompanying Cost Studies for Interconnection, Unbundled Network Elements and Local Transport and Termination and Regarding End to End Bundling Issues*, Illinois Commerce Commission, Docket 98-0396, Order at 74-90 (Oct. 16, 2001) (“*Illinois Order*”).



combines for its own use or for the use of its end user customers, including the UNE Platform and EELs.

The Kentucky Public Service Commission has ruled, in the context of an arbitration between AT&T and BellSouth, “that ‘currently combines,’ as set forth in ... FCC Rule 315(b) should be given the same meaning as ‘ordinarily combines,’ and BellSouth should combine for AT&T requested UNEs *if* those UNEs are ordinarily combined in BellSouth’s network.”<sup>77</sup> The Georgia Public Service Commission has found that the proper reading of “currently combines” means network elements that are “ordinarily combined within their [BellSouth’s] network, in the manner in which they are typically combined.”<sup>78</sup> The Tennessee Regulatory Authority has interpreted the FCC’s rules the same way.<sup>79</sup> This interpretation is the only interpretation that serves the overarching pro-competitive objectives of the Act, as the State Commissions discussed above have found.<sup>80</sup> The Illinois Commission stated it well and succinctly:

These policies (if permitted) [not providing new UNE-Ps or EELs] would deny the benefits of competition to new customers, prevent customers of UNE-P based competitors from ordering additional lines, and prevent CLECs with their own networks from efficiently extending service over a broader area. Obviously, such restrictions cannot be justified on *policy* grounds. There is no good reason to actually *sanction* a result where existing lines can be served by

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<sup>77</sup> *Petition by AT&T Communications of the South Central States, Inc. and TCG Ohio for Arbitration of Certain Terms and Conditions of a Proposed Agreement With BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Kentucky Public Service Commission, Case No. 2000-465, Order at 2 (June 22, 2001) (“*Kentucky Order*”).

<sup>78</sup> *In re: Generic Proceeding to Establish Long-Term Pricing Policies for Unbundled Network Elements*, Georgia Public Service Commission, Docket No. 10692-U (Feb. 2, 2000) (“*Georgia UNE decision*”).

<sup>79</sup> “I move to define the term ‘currently combines’ to include any and all combinations that BellSouth currently provides to itself anywhere in its network thereby rejecting BellSouth’s position that the term means already combined for a particular customer at a particular location.” Tennessee Regulatory Authority, Intermedia/BellSouth Arbitration Hearing, Transcript at 7-8. *See also, In the Matter, on the Commission’s Own Motion, to Consider Ameritech Michigan’s Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996*, Michigan Public Service Commission, Case No. 12320, Opinion and Order, 9-10 (Jan. 4, 2001).

<sup>80</sup> *See e.g., Kentucky Order* at 3.

UNE combinations, but new lines, second lines, or extended lines cannot.<sup>81</sup>

The Commission should make sure that any rules adopted in this proceeding are consistent with these pro-competitive decisions by State Commissions.

**V. CONGRESS ENVISIONED THE WIDESPREAD AVAILABILITY OF NETWORK ELEMENTS, RECOGNIZING THAT UNE AVAILABILITY IS ESSENTIAL TO PROMOTE THE ACT'S GOAL OF ROBUST, SUSTAINABLE LOCAL COMPETITION**

In its effort to foster increased competition and bring the benefits of new technologies to a wider audience of users in all segments of society and geographic locales, Congress explicitly provided for three modes of competitive entry to the local telecommunications market: “the construction of new networks, the use of unbundled elements of the incumbent’s network, and resale.”<sup>82</sup> As noted by the Commission, Congress did not “explicitly or implicitly” express a preference for one particular entry strategy or competitive arrangement, but sought to establish legal standards that would ensure that “all pro-competitive entry strategies may be explored.”<sup>83</sup>

Congress clearly anticipated the imperative for widespread UNE availability and use, recognizing in particular that unbundled local switching would be necessary for competition to emerge.<sup>84</sup> The Commission’s recently expressed preference for “facilities-based competition” (defined as competition achieved without the use of UNEs) is contrary to Congress’ intent to promote competition through use of ILEC network elements. As the Commission itself noted in the *Local Competition Order*, Congress did not “explicitly or implicitly” express a preference for

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<sup>81</sup> *Illinois Order* at 81 (*emphasis in original*).

<sup>82</sup> *Local Competition Order*, 11 FCC Rcd at 15509, ¶ 12.

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., Joint Managers’ Statement, S. Cont. Rep. No. 104-230, 104<sup>th</sup> Cong. 2d Sess. 113 (1996) (“Joint Explanatory Statement”). This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant and that some facilities and capabilities (e.g., central office switching) will likely need to be obtained from the ILECs as network elements pursuant to new Section 251.

one particular entry strategy, but instead sought to establish legal standards that would ensure that “*all* pro-competitive entry strategies may be explored.”<sup>85</sup>

Moreover, the Commission recently noted in the *UNE Remand Order* that the standards and unbundling obligations that it adopted therein were “designed to create incentives for both incumbent and competitive LECs to innovate and invest in technologies and services that will benefit consumers through increased choices of telecommunications services and lower prices.”<sup>86</sup> Furthermore, the Commission recognized that “there will be a continuing need for all three of the arrangements Congress set forth in Section 251 to remain available to competitors so that they can serve different types of customers in different geographic areas.”<sup>87</sup>

Accordingly, whatever its current policy preferences, the Commission may not override the intent of Congress by regulatory fiat. The fact remains that six years after the passage of the 1996 Act, Congress’ goal of robust local competition is still far from being achieved—and the continued availability of UNEs and UNE combinations are essential to meeting that goal at any time in the foreseeable future. In any event, even assuming *arguendo* that facilities-based (as this Commission now appears to define that term) investment should be prioritized, it must be understood that the availability and use of UNEs, and specifically the UNE Platform, does not deter investment in facilities. In fact, economic investment in facilities will be made by carriers as soon as capital conditions permit. Attempting to redirect the business plans of competitive

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<sup>85</sup> *Local Competition Order*, 11 FCC Rcd at 15689, ¶ 12.

<sup>86</sup> *UNE Remand Order*, 15 FCC Rcd at 3700, ¶ 5

<sup>87</sup> *Id.* Citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15509, para. 12 (1996) (*Local Competition Order*), aff’d in part and vacated in part sub nom., *Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997) (*CompTel v. FCC*) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997) (*Iowa Utils. Bd. v. FCC*), aff’d in part and remanded, *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further recons. pending.

carriers, and accelerate their investment in facilities and infrastructure by means of regulation – in effect, moving capital deployment forward in time from when it is economically rational – is unsound policy, and (especially in times such as the present, when the availability of funding in the capital markets is constricted) will likely lead to additional bankruptcies and business failures.

**VI. APPLICATION OF THE ‘NECESSARY AND IMPAIR’ STANDARD COMPELS RETENTION OF ALL EXISTING UNES**

The Joint Commentors maintain that under any reasonable interpretation of the Section 251(d)(2) standard for unbundling, the current list of UNES must be retained. The Joint Commentors endorse the comments being filed today by CompTel and the Fiber-Switched-Based CLEC Coalition, and accordingly do not set forth an exhaustive legal analysis applying the ‘necessary and impair’ standard to each existing UNE, but instead focus in these comments on the UNES of most importance to providers of UNE-P based services. These are the loop, unbundled local switching, shared interoffice transport, signaling and operator services/directory assistance. The Coalition submits that the definitions of several of these UNES must be clarified or modified to ensure that competitors can use them to provide competitive local services. The Joint Commentors discuss each of the above-referenced elements seriatim in the sections below.

**A. The Commission Must Continue to Require Unbundled Access to Local Loops**

Under any reasonable interpretation of the ‘necessary’ and ‘impair’ standards of Section 251(d)(2), loops will be subject to the Section 251(c)(3) unbundling obligations. As the Commission noted in its *Local Competition Order*, the House and Senate Committee on Conference’s Joint Explanatory Statement lists local loops as an example of an unbundled

network element.<sup>88</sup> Moreover, nothing has transpired since 1996 to call into question the validity of the Commission's *Local Competition Order* conclusion that "[r]equiring incumbent LECs to make available unbundled local loops will facilitate customer entry and improve customer welfare."<sup>89</sup>

Loops are essential bottleneck facilities that no doubt qualify for unbundling pursuant to Section 251(d)(2). No one can credibly argue that loops are "proprietary"<sup>90</sup> and therefore, the "impair" test applies and the Commission must determine whether removal of the loop unbundling requirement would materially diminish competitors' ability to compete. Local loops clearly meet that test.

The removal of loops from the national minimum list of UNEs would foreclose UNEs as a method of entry and effectively would repeal the pro-competitive plan adopted by Congress in the 1996 Act. No one argues that any alternative loop facilities exist today, and the cost of duplicating the existing "last mile" connections to end users makes it unlikely that a wholesale market for non-ILEC loop alternatives will develop in the foreseeable future.

Self-provisioning of loop plant, while theoretically possible, is, in most cases, uneconomic. CLECs will most likely never be able to approximate the ubiquity of ILEC plant and the economies of scale and scope that factor into the ILECs' cost structure, and this fact is well established. In today's investment climate, it is unreasonable to expect CLECs to be able to convince investors to duplicate ubiquitous ILEC loop plant, even in densely populated areas.

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<sup>88</sup> *Local Competition Order*, 11 FCC Rcd at 15689, ¶ 377 (citing Congressional Joint Explanatory Statement at 116).

<sup>89</sup> *Id.*, at 15694, ¶ 388.

<sup>90</sup> Loop unbundling does not reveal information and processes protected under intellectual property laws, and thus loops are not "proprietary" as set forth in Section 251(d)(2)(A) and defined herein. *Id.*

As the Commission found in its *Local Competition Order*, “without access to unbundled loops, new entrants would be required to make a large initial sunk investment in loop facilities before they had a customer base large enough to justify such an expenditure.”<sup>91</sup> Further, self-provisioning, in most instances, would entail a delay to market well beyond what could be considered material.<sup>92</sup> Loop deployment requires access to inside wire, rights-of-way and large amounts of capital – any one of which could make deployment prohibitive.

Thus, the Joint Commentors submit that although some alternative to the wireline local loop may become available in the future, and obviate the need for unbundling, it is highly unlikely that such loop facilities will be available – through self-provisioning or from other non-ILEC sources – in the foreseeable future, and accordingly, the Commission should continue to require the unbundling of the local loop pursuant to 251(d)(2)(B).

**B. CLECs Are Materially Impaired Without Access To ULS To Serve Mass-Market Customers**

Current federal minimum unbundling requirements established in the *UNE Remand Proceeding* do not require ILECs to offer access to local switching when used to serve customers with more than three lines that are located in certain areas of the nation’s 50 largest cities.<sup>93</sup> Fortunately for consumers and businesses in Texas, New York and Pennsylvania, their State

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (reasoning that requiring investment in duplicative loop facilities “would likely delay market entry and postpone the benefits of local competition for consumers.”)

<sup>93</sup> Specifically, C.F.R. § 51.319(c)(2) states: Notwithstanding the incumbent LEC’s general duty to unbundle local circuit switching, an incumbent LEC shall not be required to unbundle local circuit switching for requesting telecommunications carriers when the requesting telecommunications carrier serves end users with four or more voice grade (DS-0) equivalents or lines, provided that the incumbent LEC provides nondiscriminatory access to combinations of unbundled loops and transport (also known as the “Enhanced Extended Link”) throughout Density Zone 1, and the incumbent LEC’s local circuit switches are located in:

- The top 50 Metropolitan Statistical Areas as set forth in Appendix B of the *Third Report and Order* and *Fourth Further Notice of Proposed Rulemaking* in CC Docket No. 96-98; and
- In Density Zone 1, as defined in Sec. 69.123 of this chapter on January 1, 1999.

Commissions have embraced policies that ensure that UNE-P continues to be available in those States, almost without limitation, to serve mass-market consumers.<sup>94</sup> The policies adopted by those Commissions have already greatly accelerated the emergence of local competition in their respective States. By contrast, in States where only the *federal minimum* unbundling obligations apply, competition has developed far less extensively.

The record in this proceeding will ultimately demonstrate that CLECs are materially impaired without access to the ULS necessary to provide UNE-P service to serve mass-market customers throughout an ILEC's footprint, regardless of the customer's location or number of lines. As noted above, key factors for the Commission to analyze in conducting an "impairment" analysis include cost, timeliness, quality, ubiquity, and impact on network operations. For switching, this analysis involves comparing two alternatives: (1) leasing incumbent switching as a UNE; and (2) utilizing non-incumbent switching sources, either through self-provisioning or leasing from a third party. As shown below, it is clear that CLECs are materially impaired without access to ULS under any plausible application of those factors. As such, the Commission should require unrestricted access to ULS in order to allow competitors to serve the mass-market.

### **1. Ubiquity**

Ubiquity of the requisite elements is a necessary predicate of any mass-market service. Indeed, without ubiquity, a service simply cannot be considered a "mass-market" service. Offering a mass-market service in competition with an ILEC's broad menu of mass-market

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<sup>94</sup> See Case 00-C-1945, *Verizon New York, Inc. – Proceeding to Consider Cost Recovery and to Investigate Future Regulatory Framework*, Case 98-C-1357, *New York Telephone Company – Rates for Unbundled Network Elements*, New York Public Service Commission, Order Instituting Verizon Incentive Plan (issued Feb. 27, 2002); *Texas Arbitration*, Staff Matrix (issued Mar. 6, 2002); *Generic Investigation Re Verizon Pennsylvania, Inc.'s Unbundled Network Element Rates*, Pennsylvania Public Utility Commission, Docket No. R-00016683 (issued Aug. 30, 2001).

services without question requires the ability to provide a service *throughout* the incumbent's operating territory.

ILECs cannot credibly dispute the fact that, without UNE-P, a CLEC would have to establish a cost prohibitive number of collocation arrangements in ILEC end offices in order to offer a ubiquitous service that was competitive to an ILEC. Without UNE-P, CLECs seeking to serve the mass-market would have to overbuild the entire ILEC switching network, a task which is improbable, if not impossible, to complete.

## **2. Cost, Timeliness And Impact On Network Operations**

As indicated above, without access to ULS to serve the mass-market, CLECs would have to collocate in thousands of ILEC central offices. In addition to creating material impairment in terms of ubiquity, impairment in terms of cost, quality, timeliness, and substantial adverse impact on network operations would result.

The incumbent's local switch enjoys a number of legacy advantages due to its integration into the exchange network, including ubiquity (discussed above) and, just as importantly, the ability to migrate customers between different providers through automated provisioning systems. In contrast, external switches (whether self-provisioned or obtained from a third party) require manual handcrafting of every connection, a process that is more expensive, unreliable, and inherently capacity constrained.<sup>95</sup> This manual handcrafting materially impairs CLECs serving the analog mass-market<sup>96</sup> and results solely from the collocation and hot-cut processes.

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<sup>95</sup> See e.g. Gillan Direct, at 33-34, *Texas Arbitration* (filed Dec. 7, 2001).

<sup>96</sup> Although similar handcrafting is required for high-capacity digital services, a CLEC faces less impairment in the digital market for two primary reasons. First, because digital services generate substantially higher end user revenue per circuit than analog services, the cost of the handcrafting is less material for digital services. Second, and perhaps more importantly, digital services -- whether provided by the incumbent or a CLEC -- are inherently designer services, and end users of digital services -- unlike end users of analog service -- tolerate, and indeed expect, some level of initial disruption during installation.



a. **Cost**

In order to offer a mass-market service throughout an ILEC's footprint, a CLEC would have to establish a collocation network with associated backhaul transport to a CLEC's switch. Although this "collocation/backhaul" approach perhaps may work for CLECs serving digital customers at the DS-1 level and above, there is no theoretical or empirical evidence which demonstrates that such a strategy would work for analog services, because the expense is simply too great.

In addition to collocation/backhaul costs, the non-recurring charges ("NRC") associated with transferring a loop from the ILEC main distribution frame to the CLEC collocation arrangement -- a "hot-cut" -- is cost prohibitive for mass-market services. In the *Texas Arbitration*, evidence was presented that SWBT's current NRC to migrate a single analog loop to an CLEC's collocation arrangement is \$24.52.<sup>97</sup> In contrast, an electronic migration of an existing loop/port combination is \$2.56, or approximately 90% less than the hot-cut charge.<sup>98</sup> This non-recurring expense per line is in addition to the cost associated with collocation, backhaul, and switch self-provisioning. The effect of the hot-cut charge alone is material in the low margin cost structure faced by a CLEC serving the mass-market.

The testimony in the *Texas Arbitration* also demonstrated that the average revenue per switched line for SWBT in Texas last year was \$46.87. Assuming a target net profit margin of 10%, it takes nearly 5 months before just the *increase* in non-recurring cost (that is, the difference between the NRC for UNE-P and the NRC for a loop migration) is recovered.<sup>99</sup> Of course, the difference in NRC is not the only cost a CLEC has to incur in order to win a mass-

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<sup>97</sup> Gillan Direct, at 33-34.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, at 37.

market customer. CLECs also incur marketing costs, as well as their own internal provisioning costs. Because mass-market customers more frequently move from carrier to carrier, a CLEC would, in many cases, never have an opportunity to recover the non-recurring charges associated with provisioning a hot-cut, never mind generate a profit for the CLEC.

**b. Unreliability**

The manual provisioning associated with a hot-cut also results in customer outages, which are avoided in the UNE-P environment, or if the end user stays with the ILEC. The most common types of customer disruptions associated with hot-cuts include loss of service, disconnection of calls underway, and the possibility that inbound calls will not be successfully routed. Regarding the service disruptions inherent in the hot-cut process, the Commission has noted:

A hot-cut entails manually disconnecting the customer's loop in the SWBT central office and reconnecting the same loop at the competing carrier's collocation space. It also involves coordinated switch software changes at both SWBT's switch and the competing carrier's switch and the implementation of local number portability. The customer is taken out of service while the hot-cut is in progress, thereby making the cut "hot," although if the cut is successful, the service disruption will last no more than a few minutes. Thus, ensuring that a hot-cut is provisioned correctly with coordination between SWBT and the competing carrier is critical because problems with the cutover could result in extended service disruption for the customer.<sup>100</sup>

There can therefore be no doubt that the hot-cut process is particularly disruptive to mass-market consumers, who are not used to and will not tolerate service degradation as a cost of moving from one carrier to another. ILECs cannot rebut the fact that the hot-cut process injects

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*Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, at n.708 (2000) (citation omitted).

unreliability into the provisioning process that in many cases continues to adversely affect the quality of a consumer's service long after the hot-cut is complete. Mass-market customers rightfully expect that changing local carriers will be as disruption-free as changing long distance carriers. Through electronic provisioning to UNE-P, this is substantially the case. Large (enterprise) customers usually subscribe to multiple and often redundant services and have the necessary staff and equipment to manage complex integration and cut-over issues. Many large customers can add a CLEC's local service without impacting their existing services, and then move "traffic" over when the CLEC's service is proven to be operational. Small businesses and residential customers lack the necessary staff and sophisticated premise equipment and redundant facilities to manage complex conversion activities that are the rule with the hot-cut process.

**c. Inherent Capacity Constraints**

The manual handcrafting approach inherent in the hot-cut process means that the process is time consuming, thereby limiting the number that an ILEC can process in a day. Electronic UNE-P provisioning, on the other hand, allows thousands more "cut-overs" per day to be processed, thereby affording more consumers a competitive choice of provider. Again, testimony presented in the recently concluded *Texas Arbitration* is instructive on this point. There, it was demonstrated that, as of June 2001, SWBT had provisioned slightly over 143,000 UNE Loops using hot-cuts.<sup>101</sup> As of June 2001, SWBT had provisioned via electronic migration over 1,210,000 UNE-P lines.<sup>102</sup> Whether SWBT, or any ILEC possibly could have provisioned that number of UNE-P lines through the hot-cut process is extremely doubtful, to say the least.

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<sup>101</sup> Gillan Direct at 38, Table 4.

<sup>102</sup> *Id.*

For the hot-cut process to be effective, ILECs would have to increase their technician resources by many times in order to provision hot-cuts, and would also have to provision literally hundreds of additional collocation arrangements.

For example, as KMC Telecom, Inc. (“KMC”) noted in the comments it filed in the Georgia/Louisiana Section 271 proceeding,<sup>103</sup> BellSouth’s performance in meeting confirmed installation appointments for hot-cuts is abysmal. BellSouth’s own data indicate that it missed *over one-fourth* of the basic two-wire analog loop installs for KMC in Georgia during August 2001, a decline of 10% as compared to its June performance.<sup>104</sup> Further, BellSouth missed 7.7% of the DS-1 orders and 11% of the “UNE Other Design installs” in August, after missing 33% of the DS-1 installs, 19% of the two-wire loops with LNP Design installs, and 25% of the Digital loops < DS-1 and ISDN loop installs in June.<sup>105</sup> KMC noted that “such extremely poor and inconsistent performance makes it quite difficult to compete on a UNE-loop basis.” In fact, during the period July 2000 through April 2001, BellSouth missed 23% of all UNE appointments it had confirmed for KMC in Georgia.<sup>106</sup>

At bottom, CLECs serving the mass-market would experience material impairment in terms of cost, quality, timelines and impact on network operations if forced to rely on the hot-cut process to serve residential and small business customers.

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<sup>103</sup> See Comments of KMC, In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana, Federal Communications Commission, CC Docket 01-277 (filed Oct. 22, 2001).

<sup>104</sup> *Id.*, Affidavit of John D. McLaughlin, Jr.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

**3. ILECs Confirm That The Collocation/Hot-cut Process Results In Material Impairment As A Result Of Negative Impacts On Quality, Timeliness And Impact On Network Operations**

It is commonly understood by both ILECs and CLECs that there is potential for error inherent in the hot-cut process. Notwithstanding voluminous affidavits in Section 271 proceedings before this Commission touting their hot-cut performance, RBOCs know this. However, it is rare that they testify to this fact on the record. Importantly, SWBT did testify in the *Texas Arbitration* how the impairment inherent in the hot-cut process would affect it if it had to provision switching to mass-market consumers using the method it recommends for CLECs. The testimony, rare for its candor, is a little like watching a video tape from a hidden camera. SWBT witness Curie highlighted under cross examination the material impairment SWBT would face if it had to serve its mass-market customers in the same way SWBT believes CLECs should serve those customers. When asked about the difficulty SWBT would experience in moving one of its existing customers to a different switch – which is exactly what a CLEC must do to self-provide switching to mass-market customers, the following exchange resulted:

Q When you say “you [SWBT] don’t move the customers the customers to another switch,” if you did, what would that entail?

A (Curie) Well, you would have to reconnect their loops to a different switch in a different wire center, and that’s a very expensive activity for customers who are currently having service.

Q And tell me about the *expense* of that activity. You say it’s a very expensive activity. Could you explain what all needs to occur for that to happen?

A (Curie) I haven’t studied that, so I can just tell you generally what you would have to do. You would have to – one of the problems you have in that is, of course, you’ve got customers that have service. And this is a behind-the-scenes activity that you don’t want to have any transparency to the customers. But you would have to, in fact, *disconnect their appearance in the switch* in which they are currently providing service.

You would then have to move them into a different switch, and my understanding is – from an operational point of view, we don't do that because not only is it expensive, but now you are going to start having customers that are in a particular geographic area normally provided by that switch provide by some other switch, and *that creates all sorts of operational planning and implementation issues.*

And for cost efficiencies, you don't want to do that.

\* \* \*

A (Curie) I mean, you have to, in fact, do the work to take the connections off the distribution frame. So you've got a bunch of nonrecurring activities that you would have to do. And not only do you have to do those things, but *now you have the difficulty in operating the company.*

Now, where the customer is served, you are planning for an area – you are moving them elsewhere, and you don't want to do that, in general. *It just causes both short-term and long-term planning and operational problems....*

Q ...I just want to be clear because I think this is what you testified. It's not just dollar costs and operations, you also have issues of customer inconvenience or potential customer outage....

A (Curie) Certainly that is one of the considerations that a network organization has.<sup>107</sup>

ILECs understand that CLECs would experience material impairment were they required to collocate in each ILEC end office from which they sought to provide mass-market services. Given the inherent expense, operational issues, and customer disruption—conceded by SWBT—that results from the hot-cut process, it is clear that impairment would result if ULS (and thereby, UNE-P) were no longer available as a UNE to serve residential and small business customers.

The record in this proceeding demonstrates that CLECs are materially impaired without access to local switching as a UNE to serve analog mass-market customers throughout an ILEC's

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<sup>107</sup> *Texas Arbitration Tr.*, at 612-614, 616 (emphasis added).

service area. Under any reasonable application of the Act's unbundling analysis, CLECs seeking to serve analog customers of any location and of any size in an ILEC's footprint face material impairment that warrants access to ULS. There is no less impairment to serve analog customers in dense markets than there is anywhere else, and there is nothing to be gained (but significant competition to be lost) by arbitrarily limiting analog availability based on geography<sup>108</sup> or the number of analog lines at a particular location.

Moreover, there is no empirical data regarding actual commercial activity to estimate just how dense a market must be to offset these impairments, nor how much capital a CLEC must raise in order to survive long enough to reach profitability. One can reasonably assume, however, that where an *efficient* aggregation capability exists, perhaps in the largest cities, such markets could sustain competition for digital services if the concentration of DS-1 (and above) customers is sufficiently great.<sup>109</sup> While the presence of such an "impairment point" may be theoretically easy to establish, there is not yet reliable data that can be used to prove where the threshold exists. That is, the Commission may feel reasonably comfortable in concluding that there are *some* markets where the concentration of large customers may be sufficiently dense to minimize impairment (for those large customers), but identifying precisely *where* that threshold is satisfied today remains cloudy. This is particularly true given the number of bankruptcies that have characterized the industry to date.

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<sup>108</sup> Indeed, attempting to cut "holes" in the availability of local switching, as is done under the FCC's existing rules, ignores the critical importance of ubiquity to the very mass-market entry strategies that UNE-P makes possible.

<sup>109</sup> Given the absence of CLEC profitability, the Commission should not merely assume that local competition for larger digital customers is necessarily sustainable.

The Commission should approach the task of designing any limitation that would deny entrants access to local switching, even for large digital customers, with caution in light of the fact that there is little evidence that current conditions provide entrants the scale needed to reach profitability. While the Commission may wish to limit the obligation of ILECs to offer unbundled local switching when used to serve high-capacity digital customers, the Commission should be cautious in the design and implementation of such a limitation.

As indicated above, entrants attempting to serve the digital market are impaired in their ability to achieve profitable scale by the backhaul and aggregation costs that limit their competitive footprint. The likelihood of reaching scale, however, could be improved if the Commission made clear that ILECs must fully offer and support an efficient “backhaul/aggregation” option to reduce the impairment that any “external” switch confronts. Specifically, ILECs should be required to demonstrate (not merely claim) that they are supplying entrants with digital loop/transport combinations (as cost-based network elements) that enable entrants to reach additional customers without incurring the cost of collocation, that is a Real Enhanced Extended Link (“REEL”). The REEL is similar, but not identical, to the existing EEL obligation. The current EEL loop/transport obligation is only “conceptually” available to serve customers that satisfy certain calling characteristics, and its practical availability may be even less. The REEL would have none of the restrictions and limitations (and, as a result, auditing obligations) that prevent the current EEL from being a useful backhaul/aggregation option and the ILECs would be required to make the REEL *actually*, not theoretically, operational. By establishing the REEL as a prerequisite for a digital-based restriction, the Commission will have created the opportunity to perform a comparative analysis of competitive conditions among markets in different parts of the country, and use that information to decide whether to adopt a limitation on ULS availability.



### C. Shared Interoffice Transport

The ubiquitous nature of ILEC transport remains critical to the development of local competition and to the UNE entry method in particular. At this stage of local competition, a competitive wholesale market for transport facilities has not developed and unbundling remains an essential component of the infrastructure of local competition.

Shared transport is a non-proprietary network element that qualifies for unbundling under the “impair” test of Section 251(d)(2)(B). In its *Local Competition Order*, the Commission determined that shared transport was not “proprietary.”<sup>110</sup> That conclusion is compelled through an understanding of the word “proprietary,” as shared transport unbundling does not involve the disclosure of CPI or information and processes protected by intellectual property laws.

In the *UNE Remand Order*, the Commission found, in conducting its “impair” analysis with respect to shared transport, that lack of access to unbundled shared transport would impair a requesting carrier’s ability to use ULS, in that it would require the purchase of dedicated transport if the shared transport UNE were not available, and that would “materially increase the costs and decrease the quality of services” a carrier could provide, while at the same time limiting the ability to serve a broad customer base.<sup>111</sup> The Commission should reaffirm that conclusion in this proceeding, as its conclusion is no less valid today.

Indeed, the additional delay to market and increased cost structure that would be associated with self-provisioning or obtaining transport from another non-ILEC source (to the very limited extent that such sources exist) would far exceed that which could be considered

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<sup>110</sup> *Local Competition Order*, 11 FCC Rcd at 15720, ¶ 446 (“Commenters do not identify any proprietary concerns relating to the provision of interoffice facilities that LECs are required to unbundle”).

<sup>111</sup> *UNE Remand Order*, 15 FCC Rcd at 3862, ¶ 369. It would also create a barrier to entry because a CLEC would have to accumulate a certain number of customers before it could justify the expense of dedicated transport. In today’s economic climate, CLECs would likely use their most conservative assumptions and limit their geographic footprint to ensure financial viability.

material. Congress clearly intended that new entrants would be able to share in the advantages that result from the incumbency. Unbundled access to the ILECs' ubiquitous transport network is one of the ways this is accomplished.

Neither self-provisioning nor other non-ILEC sources are capable of approximating the ubiquity or the cost structure of the ILECs' shared facilities. While there may be a few alternative suppliers of shared facilities in certain areas, nothing approximating an efficient wholesale market for shared transport has developed. The extent to which competitive shared transport facilities have been built is still relatively negligible. In most cases, alternative facilities have been built for self-provisioning purposes and they have not produced excess capacity that has resulted in the development of fluid wholesale market for such services. Indeed, in the vast majority of cases, ILEC unbundled transport is the only readily available option for meeting competitors' shared transport needs.

Even a limited wholesale market will still take years to develop in those areas of the country where competition is most advanced, because most CLECs do not have the customer base, traffic volumes, and ability to raise capital necessary to begin duplicating the ILEC transport network (even in discrete segments and geographic areas) for their own use or for wholesale purposes in any significant way.

The Commission should encourage the development of wholesale markets across the nation, including those places where the potential for such development is greatest, by keeping unbundled shared transport on the Commission's national list of UNEs. As the Commission recognized in its *Local Competition Order*, a transport unbundling requirement encourages efficient network architecture deployment and promotes the ability of new entrants to combine

their own facilities with those of the ILECs.<sup>112</sup> Nowhere is this more essential than in markets where a wholesale market shows signs of developing. Lifting the transport unbundling requirement in those areas would only slow the development of a competitive wholesale market for shared transport. Without this essential building block, UNE-P entry would cease to be a viable method of serving the residential and small business markets, and the overall pace and scope of competition would be severely limited.

**D. Operator Services (OS) / Directory Assistance (DA)**

In the *UNE Remand Order*, the Commission concluded that “where incumbent LECs provide customized routing, lack of access to the incumbents’ OS/DA service on an unbundled basis does not materially diminish a requesting carrier’s ability to offer telecommunications service.”<sup>113</sup> That is, as a *condition precedent* to withdrawing OS/DA from the national list of network elements, ILECs must implement “customized routing to the requesting carrier as part of the unbundled switching element” to allow CLECs to direct their OS and DA traffic to alternative providers.<sup>114</sup> The Commission’s *UNE Remand Order* conclusion with respect to OS/DA flowed from the Commission’s conclusion that competitive OS and DA services are available from alternative providers. However, the Joint Commentors submit that the relevant issue is not whether OS and DA can be obtained from alternative sources, but whether OS and DA traffic can *be efficiently delivered to other providers* so that entrants have a practical choice. In other words, the impairment is not whether alternatives exist, but whether OS/DA traffic can be practically routed to those alternative providers utilizing “customized routing.” This is a particularly critical issue with respect to UNE-P. The answer to the inquiry is, at this time, an

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<sup>112</sup> See, e.g. *Local Competition Order*, 11 FCC Rcd at 15721, ¶ 447.

<sup>113</sup> *UNE Remand Order*, 15 FCC Rcd at 3891, ¶ 441.

<sup>114</sup> *Id.*, at 3893, ¶ 446.

unequivocal “no.” Accordingly, CLECs would be materially impaired without unbundled access to OS and DA.

As explained above, UNE-P providers have brought competitive local choice to mass-market customers in urban, suburban and rural markets throughout the United States. While UNE-P services are clearly providing a public benefit, the same geographic dispersion that has allowed UNE-P carriers to penetrate the market on a geographically dispersed basis also means that UNE-P providers must have the ability to economically aggregate and transport the OS and DA traffic of their customers in order to use an alternative to the OS and DA services of the ILEC in their respective territories. In the *UNE Remand Order*, the Commission acknowledged, and then unjustifiably discounted, the impairment that arises as a result of being required to purchase dedicated DS-1 transport facilities to haul OS/DA traffic from CLEC end offices to alternative OS/DA providers.<sup>115</sup> The Commission never considered the far greater impairment faced by mass-market entrants that would be forced to purchase dedicated transport from widely distributed ILEC end-offices for transport to an alternative provider. For the reasons set forth below, the Joint Commentors urge the Commission to follow the lead of the Texas PUC, and require ILECs to continue to offer OS and DA as unbundled network elements until ILECs are able to offer (and demonstrate the ability to provision) a custom routing option that provides the necessary aggregation to viably reach alternative OS/DA providers.

**1. CLECs Are Impaired Without Unbundled Access To OS/DA Because The Geographic Dispersion Of The Mass-market Impairs CLECs Seeking To Offer OS/DA Services Using Third Party Providers**

There is extensive evidence of the impairment that is faced by UNE-P carriers that have no viable alternative to the OS/DA offerings of the ILECs, given the ILECs’ current illusory

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<sup>115</sup> *Id.*, at 3896-3897, ¶¶ 451-453.

“custom” routing options. Because UNE-P providers serve the mass-market and offer service across the ILEC footprint, UNE-P carriers end up with widespread OS/DA traffic that, in the absence of an unbundled OS/DA offering, must be hauled from each ILEC end office to an alternative OS/DA provider over direct trunk DS-1 groups, which are very expensive, and which expense cannot be justified, given the fact that UNE-P providers sometimes serve only a few customers in a given ILEC end office. In fact, a CLEC must acquire a significant market share in a given market to justify a DS-1 trunk.

The Texas UNE-P Coalition presented evidence in the *Texas Arbitration* that demonstrated that even if a new entrant CLEC gained a 5% market share, it could only justify a DS-1 trunk group to four end offices out of more than 300 wire centers in that State,<sup>116</sup> serving less than 6% of the customers.<sup>117</sup> No new entrant could ever overcome the reduced traffic efficiencies and dramatically higher costs associated with attempting to aggregate such small volumes of traffic. The costs associated with establishing hundreds of DS-1 OS/DA trunk groups that would be required in the absence of unbundled OS/DA is staggering, and cannot be economically justified by the traffic levels of any new entrant CLEC. As the Michigan Commission found:

The record supports the ALJ’s finding regarding the infeasibility and limited usefulness of the customized routing that Ameritech Michigan proposed to accommodate the CLEC’s OS/DA requirements. The record indicates that providing this type of customized routing as the only alternative to purchasing Ameritech Michigan’s wholesale OS/DA services at market prices (set by Ameritech Michigan) would require each CLEC to establish dedicated trunks to every end office it serves. The Commission

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<sup>116</sup> See e.g. Gillan Rebuttal, at 21-22. DS-1 trunk groups are roughly 80% less expensive, per VGE, than individual circuits.

<sup>117</sup> *Id.*

finds that this alternative would be costly, inefficient and burdensome.<sup>118</sup>

Accordingly, the Commission should find, as the Texas and Michigan Commissions have, that the limited usefulness of the customized routing offered by the ILEC, which would require each CLEC to establish dedicated trunks to every end office it serves, is too costly, inefficient, and burdensome to support a finding that OS/DA should not continue to be subject to unbundling.

**2. The Commission Should Continue To Require That ILECs Offer OS And DA As UNEs Until They Can Demonstrate That An Efficient Custom Routing Scheme Has Been Implemented That Allows CLECs To Aggregate And Transport Their OS/DA Traffic To Alternative Providers Without Impairment**

Any ILEC “custom” routing solution that would require each CLEC to establish a dedicated transport network at each ILEC central office in order to transport its OS/DA traffic to an alternative OS/DA provider simply is not practical. Because of their relatively low traffic volumes, CLECs cannot justify such an expensive and extensive network. Until a custom routing arrangement that enables traffic aggregation is available, OS and DA must remain as network elements.

The nation’s largest long distance carriers may have preexisting trunk groups to virtually every central office. Thus, requiring ILECs to allow OS/DA traffic to be aggregated over existing Feature Group D trunks may be a solution for those few carriers. But that approach is not useful for UNE-P carriers. The Joint Commentors do not have preexisting dedicated trunk groups to every ILEC central office in a given market. Accordingly, the Commission should continue to require ILECs to provide OS and DA as network elements until such time as it can

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<sup>118</sup> See *Opinion and Order*, Case No. U-12622, Michigan Public Service Commission, p. 21 (March 19, 2001).

demonstrate that an efficient aggregation scheme has been implemented that would allow UNE-P carriers to “custom route” and transport their OS/DA traffic to alternative providers without impairment.

Accordingly, the Commission must consider as part of its impairment analysis, the effect on OS/DA costs where an entrant is seeking to serve a broadly dispersed market by leasing access from the incumbent LEC’s switch, in particular, the cost to *aggregate* OS and DA traffic in a UNE-P environment, something which its previous analysis failed to consider.<sup>119</sup>

**VII. REDLINING ANALOG BUSINESS LINES, OR RESTRICTING UNE-P AVAILABILITY IN SOME LOW COST AREAS, WOULD IRREPARABLY HARM MASS-MARKET COMPETITION**

Although no precise definition of “mass-market” exists,<sup>120</sup> mass-market telecommunications services are generally those that are: (1) designed to appeal to a broad cross section of customers; (2) provisioned under month-to-month arrangements, not requiring contractual term commitments from the customer; (3) supported by systems intended to accommodate routine changes (such as customer moves) with little or no service disruption; (4) offered across a broad footprint, with little change in product design and/or pricing to reflect unique geographic circumstances; and (5) provided at a relatively low margin per customer, with profitability achieved through volume.<sup>121</sup>

Most analog phone services – whether sold to businesses or residences – are, from an engineering and provisioning standpoint, standardized mass-market arrangements. These services are typically provisioned through automated systems that quickly, reliably and

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<sup>119</sup> *UNE Remand Order*, 15 FCC Rcd at 3897, ¶ 452.

<sup>120</sup> In its *UNE Remand Order*, the FCC recognized that there were differences between mass-market and specialized business services, but lacked the record to more fully define the distinction. “No party in this proceeding, however, identifies the characteristics that distinguish medium and large business customers from the mass-market.” *UNE Remand Order*, 15 FCC Rcd at 3829, ¶ 291.

<sup>121</sup> *Id.*

inexpensively activate service, change features and process changes. These are common services that residences and businesses alike have come to expect to be offered without term contracts, handcrafting, or special engineering. Mass-market entry strategies require both (1) efficient access to the majority of the potential customers within the mass-market; as well as (2) efficient and inexpensive provisioning systems that can reliably accommodate large volumes of orders at a relatively small transaction cost. Fulfillment of these two general criteria, in turn, enable mass-market entrants to offer their services across an entire market footprint.

UNE-P is the only entry strategy that demonstrates any hope of enabling mass-market competition. Competition for the typical mass-market user – the residential customer and the small business – is not only critically important to these customers, but for overall competition as well. First, the mass-market remains the core of the incumbent's monopoly. Switched services account for the vast majority of the regulated revenues of most ILECs, and analog lines (which today are the core of the switched mass-market) are, in most cases, around 95% of an ILEC's switched lines.<sup>122</sup> If this core market is denied competitive choice, the resulting monopoly would provide ILECs with a reservoir of revenues and captive customers that they could leverage against providers of more specialized services. Accordingly, the Commission should not adopt (or maintain) rules in this proceeding that would restrict UNE-P availability in some locations or for some customer types, thereby impeding carriers' ability to serve mass-market consumers, or the result would be irreparable harm to overall competition.

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<sup>122</sup> See e.g. SWBT Texas: Source: ARMIS 43-03 (Regulated Revenues) and 43-08 (access lines by technology).



**A. Entrants With Mass-market Business Strategies Must Be Able To Compete In Both Low And Higher Cost Areas**

It is important to appreciate the interrelationship between UNE-P as a successful entry strategy at the “bottom of the ladder,” and its availability at the “top.” ILECs compete across both low and high cost areas, and for both urban and rural customers. This enables ILECs to treat higher cost areas as incremental to their business interests. CLECs must have the same opportunity. The availability of UNE-P in urban markets facilitates competition statewide. Without getting into a debate as to whether this means that urban customers “subsidize” rural customers, ubiquitous availability of UNE-P means that the common costs incurred to provide UNE-P across an ILEC footprint can be spread across a larger customer base. Entrants must have the ability to recover joint costs by competing for both residential and small business lines.<sup>123</sup> If the Commission were to limit UNE-P availability to only the less attractive markets and customer groups (through establishment of a restriction on ULS availability based on some arbitrarily defined line number or geographic area), these shared efficiencies would go away, and entrants would have to recover *all* of their common costs from a smaller (and less profitable) subgroup. This is not a viable or sustainable option.

Whether the public will view local competition as successful will largely depend upon whether the public itself benefits. Limited competition for some larger businesses, or some businesses and residents in discrete, wealthy areas, is not what consumers and most businesses expect from the 1996 Act or this Commission.

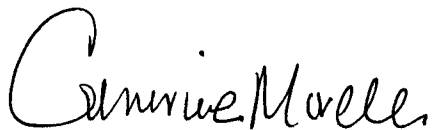
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<sup>123</sup> See, e.g., Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Ninth Report & Order and Eighteenth Order on Reconsideration*, 14 FCC Rcd 20432, 20441-20442, ¶ 16.

### VIII. CONCLUSION

For the foregoing reasons, the Joint Commentors urge the Commission to adopt the proposals and requirements outlined herein.

Respectfully submitted,



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